

Combating Trafficking in Human Beings for Labour Exploitation



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Introduction

In this book, the results of the project ‘Combating THB for Labour Exploitation’ funded by the European Commission and commissioned to Tilburg University are presented.¹ The research started in April 2010, and was concluded with a closing seminar on 8 April 2011. Researchers with different legal backgrounds from five countries; Austria, the Netherlands, Romania, Serbia and Spain², participated in the project.

When combating trafficking in human beings (THB) in general, a comprehensive approach based on human rights to combat it is advocated at an EU level. The prosecution of traffickers and the protection of victims of THB are two of the main features of this approach. The overall aim of the project was to bring together the prosecution of traffickers and the protection of victims of THB as two aspects of the human rights based approach to THB for labour exploitation in an integrated and interrelated way, and to strengthen the operational response to this form of THB. Based on this aim the following research question was drawn:

What obstacles and best practices can be identified (in police and judicial cooperation) in the participating States when identifying victims and when investigating and prosecuting (cross-border) THB for labour exploitation?

Based on the Palermo Protocol³, the extension of the definition of THB to labour exploitation requires additional skills, knowledge and awareness for effective investigation and prosecution, and for the identification and assistance of victims of this form of THB. Actors (such as labour inspectorates, social investigation services and municipalities) other than the police and the prosecution services have also become involved in these activities. It is unclear which role these actors can have in identifying victims and in investigating and prosecuting (cross-border) THB for labour exploitation and which

¹ Full title of the project: ‘Improving the investigation and prosecution of THB for labour exploitation. Identifying problems and best practices’ number Project JLS/2009/ISEC/AG/176.

² See Appendix 1 for a list of the participants in the project.

³ Protocol to the United Nations Convention against Transnational Organised Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 15 November 2000 A/RES/55/25.

improvements are needed. They are often unfamiliar with, for instance, the specific needs of victims, how trafficking networks operate, and how to cooperate with colleagues abroad. These problems obviously hamper the combating of THB for labour exploitation. In addition, difficulties in defining THB for labour exploitation still exist. Labour exploitation, as such, is not a term used in the Palermo Protocol or the EU Directive on Preventing and Combating THB and Protecting Victims. When considering the explanation of exploitation given in the Palermo Protocol, one can make the distinction between THB for the purpose of sexual exploitation, labour exploitation (including forced and compulsory labour and services, slavery and slavery-like practices) and the removal of organs. It is in this way that the term labour exploitation in this research must be understood, although this does not solve the problems encountered in defining the crime.

In this book, these problems, as well as the challenges of dealing with these problems, are identified. To this end, research took place in the five participating countries and the EU legal framework was analysed. The results thereof formed the basis of further reflections and recommendations. The country reports are based on information derived from three main sources; 1) an analysis of the legal framework, relevant policy and case law, 2) semi-structured interviews with at least ten experts involved in the investigation and prosecution of (cross-border) THB for labour exploitation, and the protection and assistance of victims of THB for labour exploitation, and 3) the study of two (transnational) cases of THB for labour exploitation. Terms of reference for the country reports, questionnaires for the semi-structured interviews and the case studies were drafted beforehand in order to be able to conduct the analysis of the reports. Based on the terms of reference, the reports are divided into five parts: the legal framework, cooperation in the investigation and prosecution (national and international), victim protection and assistance, case studies, and recommendations. These reports, and the analysis thereof, were discussed during a meeting with invited experts in February 2011, when distinguished specialists made valuable contributions to various aspects of the reports, which were gratefully used to further improve them.

The book contains the results of the country studies in separate chapters, a chapter on the EU legal framework and a chapter on the results of the analysis of the country studies. Furthermore, four chapters are included in which experts in the field of THB for labour exploitation reflect on some of the findings of the project.

Planitzer and Sax, start with an analysis of the situation in Austria and point out that there is still a lack of attention to THB for labour exploitation, which is reflected in the low number of prosecutions and convictions. They furthermore focus on the difficult overlap in the crime of THB for labour exploitation and the exploitation of foreigners, which is defined as a separate crime in Austria. In the next chapter, the situation in the Netherlands is reflected upon by Heemskerk and Rijken. The Netherlands is the only country in this research that has a Social Security Intelligence and Investigation Service specialised in, among other things, labour law issues. Although this service is not used to its full potential, cases of THB for labour exploitation do require specific expertise and therefore it is good to have such a specialised service. In the Netherlands, there is also a great struggle in relation to the definition of THB for labour exploitation. After five years of irresolution by the judiciary to qualify situations as being THB for labour exploitation, a development has now taken place in the opposite direction. In his analysis of the Romanian situation, Zaharia draws our attention to a specific aspect of Romanian law that qualifies the violation of labour laws as a form of THB for labour exploitation when it was preceded by acts and means. Furthermore, he explains the paradoxical situation in Romania in which some situations where exploitation did not take place are punished more severely than situations where exploitation did indeed take place. Copic and Nikolić-Ristanović, in their contribution on Serbia, make us aware that the problems in Serbia are different because Serbia is primarily a country of transit and origin. When law enforcement officers take action in cases of THB for labour exploitation, the cases are often difficult to qualify as such because the exploitation has not actually taken place and the intent of the suspect to exploit the person is difficult to prove. In addition, the researchers give valuable insight into the needs and problems that are specific to victims of THB for labour exploitation. The way that support and assistance is organised in Serbia, with a central role for the Agency for the Coordination of Protection of Victims of Trafficking in Human Beings, a State service from the Ministry of Labour and Social Policy, is different from the other States and makes victim support and assistance less dependent on law enforcement, although Copic and Nikolić-Ristanović have some critical observations as to its functioning. Arrieta Idiakez, Manrique López and Manrique Rojo explain the newly adopted legislation in Spain. It is interesting to note that apart from a provision for THB for labour exploitation, they also have a separate section in the criminal code dealing with Criminal Labour Law. The authors analyse the link between these two areas of crime in Spanish law. In their research, they show that Spain has recently taken some

important steps to combat THB for labour exploitation in which cooperation between various actors is specifically addressed. Furthermore, they point out the specific position of Spain as an EU Member State that receives a high number of Third Country Nationals and how this relates to the problems of THB for labour exploitation. In order to be able to place the country studies in the EU environment, Middelburg and Rijken give an analysis of the EU legal framework as far as is relevant for the contribution to a human rights based approach. In the chapter on pitfalls and challenges to combat THB for labour exploitation, Rijken points out the main problems and good practices that can be derived from the country studies. She places these in a broader perspective, including the current debates on the relevant matters. She finally draws conclusions and makes recommendations that might support the EU to further operationalise a comprehensive approach based on human rights for THB for labour exploitation.

Further in the book, distinguished experts in the field reflect on some of the outcomes of the project. Van der Leun, in her contribution, centralises the relation between migration and THB on the punitive and protective perspectives of THB for labour exploitation, and concludes that organisations seem to be divided between those looking at labour issues and migration control on the one hand, and those aiming at combating THB on the other. She furthermore pleads for an increase in the possibilities for people to work legally in the EU. Van Dijk and Vonk give their reflections on a broad spectrum of issues, including areas that are normally not linked with THB for labour exploitation. By doing so, they implicitly show that THB for labour exploitation affects many more aspects of our daily life than law enforcement, victim protection and labour law. They finally focus on the role Europol can play in combating THB for labour exploitation. Beirnaert focuses on international discussions in relation to labour exploitation and shows the important role that the ILO had and still has in this field. He highlights the role that trade unions play or must play in the agency of workers, which is considered key in effectively combating THB for labour exploitation. The last chapter, by van Krimpen, gives a detailed insight into the whimsical developments in Dutch case law in relation to defining THB for labour exploitation. She makes some critical remarks about the latest developments in which convictions for THB took place in relation to the purchase of telephone contracts, which were considered as a service in relation to THB.

Considering this short overview of the content of the book, it is clear that concerted action to combat THB for labour exploitation must be taken in various areas, rather than being limited to merely legal or repressive measures. With this book, we hope to contribute some guidance for such action not only on an EU level but on a national level as well.

I would like to express my gratitude to the European Commission as well as the institutions the researchers work at, for (co-)funding this project. I am furthermore thankful to our experts in the project (Bärbel Uhl and Floris van Dijk) for the valuable discussions and contributions throughout the project. Last but not least I want to thank the researchers for their dedication to the project and the inspiring cooperation. I hope that the outcome of the project will stimulate all of us to bring the comprehensive approach based on human rights a step closer.

Conny Rijken
Tilburg, March 2011

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ADAPRE	Association for the Development of Alternative Practices of Reintegration and Education
AECID	Spanish International Co-operation for Development Agency
AEL	Alien Employment Law
AI	AI <i>Arbeidsinspectie</i>
AMF	Directie Arbeidsmarktfraude van de Arbeidsinspectie <i>(Directorate Market Fraud of the Labour Inspectorate)</i>
APA	Aliens' Police Act
Arbo	Directie Arbeidsomstandigheden <i>(Directorate Labour Conditions of the Labour Inspectorate)</i>
art	Article
AWR	Algemene Wet Rijksbelastingen <i>(General Act on Royal Taxes)</i>
B9 procedure	Chapter B9 of the Immigration Circular part B
BDTRATA	Data-Management System regarding Trafficking in Human Beings.
BNRM	Bureau Nationaal Rapporteur Mensenhandel <i>(Bureau National Rapporteur Trafficking in Human Beings)</i>
CC	Criminal Code
CCP	Code on Criminal Procedure
CCLA	Corporate Criminal Liability Act
cf.	compare
CIE	Criminele Inlichtingen Eenheid <i>(Criminal Intelligence Unit)</i>
CJIB	Centraal Justitiele Incassobureau <i>(Central Fines Collection Agency)</i>
CoMensha	Coördinatiecentrum Mensenhandel <i>(Coordination Center THB)</i>
COMMCA	Council of Ministers of Women's Affairs of Central America.
COS	Comprehensive Operational Strategic Planning for the Police
CPS:	Country Strategy Papers.
CV:	Curriculum Vitae.
DIOCT	Department for Investigating Organised Crime and Terrorism

ABBREVIATIONS

DNR	Dienst Nationale Recherche van de Korps Landelijke Politie Diensten <i>(National Investigation Team of the National Police Services Brigade)</i>
DPC	Wetboek van Strafrecht <i>(Dutch Penal Code)</i>
DPPC	Wetboek van Strafvordering <i>(Dutch Penal Procedure Code)</i>
DSO	Dienst Stedelijke Ontwikkeling <i>(Service Urban Development)</i>
eds	editors
eg	for example
EJN	European Judicial Network
EMM	Expertise Centrum Mensenhandel Mensensmokkel <i>(Expertise Center Human Trafficking Human Smuggling)</i>
ESBC:	Eastern Sea Borders Centre.
EU	European Union
EUBAM	European Union Border Assistance Mission
EU-JZG	Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union
EU-PolKG	EU-Polizeikooperationsgesetz
FATF	Financial Action Task Force
FIOD	Fiscale Inlichtingen- en Opsporingsdienst <i>(Fiscal Intelligence and Investigation Department)</i>
FMEIA	Federal Ministry for European and International Affairs
Functional Office	Functioneel Parket van het OM <i>(Functional Office of the national prosecution service)</i>
G.D.	Government Decision
G.E.O.	Government Emergency Ordinance
G.O.	Government Ordinance
JIT	Joint Investigation Team
IBF	Interventionsstelle für Betroffene des Frauenhandels
ID	Identity
ILO	International Labour Organisation
IND	Immigratie en Naturalisatiedienst <i>(Immigration and Naturalization Service)</i>
KLPD	Korps Landelijke Politiediensten <i>(National Police Services Brigade)</i>
SIVE	Integrated Border Patrol System
SIS	Schengen Information System

SPA	Security Police Act
SRA	Settlement and Residence Act
SVB	Sociale Verzekeringsbank (<i>Social Security Bank</i>)
SZW	Ministerie van Sociale Zaken en Werkgelegenheid (<i>Ministry Social Affairs and Employment</i>)
THB	Trafficking in Human Beings
TRLET	Royal Decree 1/1995 of 24 March, which approves the consolidated text of the Law of the Statute of Workers.
TRLISOS	Royal Legislative Decree 5/2000, of 4 th August, which approves the ‘Consolidated Law on Offenses and Penalties in the Social Order’.
UNODC	United Nations Office on Drugs and Crime
UN	United Nations
UNGA	United Nations General Assembly
UWV	Uitvoeringsinstituut Werknemers Verzekeringen (<i>Employee Insurance Agency</i>)
VCA	Victims of Crime Act
VIS	Visa Information System
WAV	Wet Arbeid Vreemdelingen (<i>Aliens Employment Act</i>)
WML	Wet Minimum Loon en Minimum Vakantietoelage (<i>Act Minimum Wage and Minimum Holiday Allowance</i>)
WSBC	Western Sea Borders Centre

Chapter 1

Combating Trafficking in Human Beings for Labour Exploitation in Austria

Julia Planitzer and Helmut Sax¹

Part I

The legal framework on defining Trafficking in Human Beings for labour exploitation and the dimensions of this crime

1.1 The definition of Trafficking in Human Beings for labour exploitation in Austria

Trafficking in human beings (THB) is legally defined in the Criminal Code² and follows in general the definition given in Art. 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime³ of *trafficking in persons*.

The forms of *exploitation* provided for in Criminal Code s. 104a (1) are: sexual exploitation, the removal of organs and labour exploitation.

For various reasons, CC s. 104a does not list all forms of exploitation as given in the Palermo Protocol. Forms of exploitation such as slavery or forms similar to slavery would be covered by the offence ‘trafficking in slaves’ of CC s. 104⁴ and therefore CC s. 104a speaks only about ‘labour exploitation’. The term ‘trafficking in slaves’ can, however, be misleading since the offence includes (since 2009) also slavery in itself, and treating a person like a slave.⁵ In particular, CC s. 104 includes deprivation of liberty of a person through slavery and slavery-like practices. The central characteristic of slavery is the fact that a person is seen as an object and as property which can be used at will and arbitrarily. Slavery-like practices include debt bondage and serfdom.⁶

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² Criminal Code (Federal Law Gazette No. 60/1974), s. 104(a).

³ UNGA Res 55/25 (15 November 2000), Annex II, hereinafter ‘Palermo Protocol’.

⁴ For a long time hardly not used, the offence ‘trafficking in slaves’ gained a lot of publicity since in the famous case ‘F.’ the perpetrator was accused of slavery for having locked the victim for 24 years in a cellar.

⁵ K. Schwaighofer, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) CC s. 104(2)(a).

⁶ K. Schwaighofer, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) CC s. 104(4).

Practices which do not fulfil all criteria of slavery and acts similar to slavery would be caught by the offence of trafficking in human beings (CC s. 104a).

Exploitation within the meaning of CC s. 104a includes the ruthless and lasting oppression of vital interests. The perpetrator has to intend to oppress the vital interests in the longer term. It is irrelevant whether the perpetrator or a third person is the beneficiary of the exploitation. An additional important element of exploitation is the significant disproportionality between ‘services’ delivered by the victim and the reward for them.⁷ Since the offence ‘pimping’ (CC s. 216) includes the term exploitation and exists longer than the offence ‘trafficking in human beings’ in the Austrian CC, relevant case law regarding ‘exploitation’ exists within ‘pimping’. The interpretation of ‘sexual exploitation’ as well as ‘labour exploitation’ is influenced by the case law on ‘pimping’. Under this offence, exploitation occurs when the majority of payments are taken away ruthlessly. Consequently, vital interests of the victim are infringed.⁸ Sexual exploitation within THB occurs when the victim has to conduct sexual services and the full or predominant parts of payments are held back. Not only can lack of payments amount to exploitation, but working conditions can also lead to an infringement of vital interests. Exploitation is not foreseen when difficult working conditions are compensated with higher payments.⁹

However, the term ‘labour exploitation’ within the provision on ‘trafficking in human beings’ would include a ruthless exploitation of vital interests of the victim. This would include *inter alia* circumstances in which the victim either does not receive any, or receives entirely inadequate, remuneration for his or her work for a lengthy period of time. Exploitation also includes instances where regular working hours are excessively exceeded or when working conditions are unacceptable. Payments falling slightly under the minimum wage, foreseen in collective agreements, as well as the occasional exceeding of average working hours, will not amount to exploitation.¹⁰ CC s. 104a also covers begging as a possible form of labour exploitation.¹¹

Trafficking for the purpose of exploitation in respect of *prostitution* is not mentioned explicitly in CC s. 104a – it speaks only about *sexual exploitation*. The reason for this phrasing can be found in the historical development of CC

⁷ K. Schwaighofer, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) CC s. 104(a)(8).

⁸ Supreme Court (OGH), 12 Os 73/81, 16 July 1981 see also Supreme Court (OGH), 12 Os 17/85, 9 May 1985.

⁹ K. Schwaighofer, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) s. 104(a)(9).

¹⁰ Materials regarding the Law on amending the CC 2004 (Federal Law Gazette No. 15/2004) p. 12.

<http://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00294/fname_010159.pdf>
accessed 17 November 2010.

¹¹ Interview with a public prosecutor (November 2010).

s. 104a, as this particular provision was only implemented in 2004.¹² Until 2004, trafficking in human beings only covered trafficking in prostitution, which no longer fulfilled the requirements of the Palermo Protocol. Although a new section on trafficking in human beings was implemented, the former version remained in the CC and has the title ‘transnational prostitution trade’ (CC s. 217).

Summarised as *action* within the definition of the Palermo Protocol, the Criminal Code lists recruitment, harbouring or receipt of persons, transportation, offering and passing on. *Means* include deceit, abuse of power, exploitation of situations of distress or of mental illness or any condition rendering the person defenceless as well as giving or receiving of payments or benefits to achieve the consent of a person having control over another person. In the case of child trafficking, the use of ‘means’ is not an essential requirement.

There are different levels of sanctions foreseen. The usual penalty for THB can be up to a maximum of three years imprisonment. In cases where the perpetrator used threat or force, the penalty is between six months and 5 years. Aggravating circumstances include trafficking in children below the age of 14, committing the crime within the activities of an organised criminal group, causing particularly serious harm to the victim, or the use of severe force, which will lead to sanctions of between one and ten years imprisonment.

CC s. 104a does not provide, as foreseen in the Palermo Protocol, for a specific clause dealing with the consent of the victim. It is assumed by the Austrian legislator that the usage of ‘(unfair) means’ constitutes an impaired free will.¹³ Consequently, a specific clause was not deemed necessary.

1.2 Other legislation and policies relevant for Trafficking in Human Beings for labour exploitation

1.2.1 Criminal law

Transnational prostitution trade

Closely linked to CC s. 104a is the offence covering the ‘transnational prostitution trade’, which – as mentioned above – used to be *the* offence on trafficking in human beings until 2004. CC s. 217 is usually also mentioned along with ‘trafficking in human beings’ as the relevant provision regarding

¹² Law on amending the CC 2004 (Federal Law Gazette No. 15/2004).

¹³ Materials regarding the Law on amending the CC 2004 (Federal Law Gazette No. 15/2004) p. 13

<http://www.parlament.gv.at/PAKT/VHG/XXII/I/I_00294/fname_010159.pdf>
accessed 22 November 2010.

trafficking in human beings in general.¹⁴ CC s. 217 punishes the recruitment or procurement of a person into prostitution in another country. If the perpetrator seeks regular profits from these criminal acts, the punishment is between one and ten years imprisonment. CC s. 217 (2) foresees the same punishment in cases where the perpetrator uses force or deceit regarding the work to be done in the other country. The title of this offence might be misleading, since the actual definition of ‘trafficking in human beings’ does not have to be necessarily fulfilled.¹⁵

Firstly, CC s. 217 (2) can be applied for cases of trafficking in human beings for the purpose of sexual exploitation only. Offences covering trafficking in women for the purpose of exploitation in prostitution can fall under CC s. 104a or CC s. 217 as well. In order to apply CC s. 217, an additional special intent to exploit has to be proven. If this is the case, the application of CC s. 217 prevails over CC s. 104a due to its higher punishment. If both would be applicable, CC s. 217 (2) and CC s. 104a, then ‘transnational prostitution trade’ is used.

The second difference between ‘trafficking in human beings’ and ‘transnational prostitution trade’ is the fact that a border needs to be crossed in order to apply CC s. 217. The victim is brought from one State to another. The victim does not have the citizenship of this State and does not permanently reside there. Also, movements between EU Member States are covered by CC s. 217.¹⁶

The available statistics show that ‘transnational prostitution trade’ is applied rather often compared to the application of CC s. 104a (‘trafficking in human beings’).¹⁷ Since ‘transnational prostitution trade’ prevails in cases of trafficking in women for the purpose of exploitation in prostitution, it can be assumed that a major part of Austria’s cases on trafficking in women are dealt with under CC s. 217.¹⁸ In conclusion, the offence ‘trafficking in human beings’ is

¹⁴ Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 25.

¹⁵ T. Philipp, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) s. 217(1).

¹⁶ T. Philipp, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) s. 217 (12) (emphasis added).

¹⁷ Convictions regarding CC s. 217: 85 in 2007, 18 in 2008 and 30 in 2009. Judicial criminal statistics 2007, 2008 and 2009 of Statistics Austria <http://www.statistik.at/web_de/dynamic/statistiken/soziales/kriminalitaet/verurteilungen_gerichtliche_kriminalstatistik/publikationen?id=6&webcat=176&nodeId=333&frag=3&listid=176> accessed 18 November 2010.

¹⁸ Generally, next to CC s. 104a (‘trafficking in human beings’) and CC s. 217 (‘transnational prostitution trade’) further provisions of the CC are mentioned being relevant for trafficking in human beings for the purpose of sexual exploitation: These are CC s. 214 (‘paid negotiation of sexual contacts with minors’), CC s. 207 (b) (‘sexual abuse of minors’), CC s. 215 (‘leading persons towards prostitution’) and CC s. 215 (a)

regulated in CC s. 104a, which covers all forms of exploitation. Nevertheless this offence is accompanied by ‘transnational prostitution trade’, which can also cover cases of trafficking in women for the purpose of exploitation in prostitution.

Corporate liability

As well as establishing the criminal liability of individuals, Austria is also obliged to establish the criminal liability of legal persons with regard to trafficking in human beings.¹⁹ The Austrian Corporate Criminal Liability Act²⁰ implements these obligations and States that all criminal offences are covered by the Act, including trafficking in human beings.²¹ When cases of trafficking in human beings are committed for the benefit of a legal person, the CCLA would be applicable. Since entering into force in 2006, the CCLA has not been applied very often and no specific case on trafficking in human beings has been dealt with. In the years 2006 and 2007, no convictions of legal persons based on the CCLA were registered. The comparably low number of cases lodged under the CCLA has also not met the expectations of the implementing Ministry of Justice; however the number of cases increased significantly in the year 2007.²² The Ministry of Justice currently evaluates the application of the CCLA and has been asked to help increase the number of applications by offering guidelines for public prosecutors.²³ But given the low numbers of cases under the CCLA, combined with the low numbers of cases before courts dealing with THB in general, it might be concluded that it will take further time until the CCLA can be applied effectively against THB for the purpose of labour exploitation in business.

(‘promoting prostitution and pornographic actions of minors’). Since the report focuses on trafficking for the purpose of labour exploitations, these provisions are not further discussed.

¹⁹ Cf. Council of Europe Convention on Action against Trafficking in Human Beings (No. 197, adopted 16 May 2005, entered into force 1 February 2008) art 22 and Council Framework Decision 2002/629/JHA on combating trafficking in human beings [2002] OJ L203/1 art 4.

²⁰ Federal Law Gazette I No. 151/2005 as amended by Federal Law Gazette I No. 112/2007.

²¹ Cf. CCLA s. 1(1).

²² National Council of the Parliament, Answer to parliamentary question 4398/J-NR/2008 (14 July 2008)

<http://www.parlament.gv.at/PAKT/VHG/XXIII/AB/AB_04399/fnameorig_116474.html> accessed 18 November 2010.

²³ Council of Europe, Group of states against corruption, *Joint First and Second Round Evaluation Compliance Report on Austria* (Report) (11 June 2010) paras 105-107 <http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2%282010%291_Austria_EN.pdf> accessed 18 November 2010.

The principle of extraterritoriality

CC s. 64 contains a catalogue of offences which can be prosecuted when committed by Austrians abroad. All offences listed in CC s. 64 can be prosecuted irrespective of the criminal law of the country where the offence was committed. This catalogue contains *inter alia* ‘trafficking in slaves’, ‘trafficking in human beings’ and ‘transnational prostitution trade’.

1.2.2 Labour law

An employee is one who obligates him/herself to work for an employer based on a written or oral employment contract. Main characteristics of an employment relationship are the personal dependency and the economic dependency of the employee. Employees enjoy the full protection of labour laws. The labour contract contains obligations for employers and employees. It includes the obligation to pay wages for the employer and the obligation on the part of the employee to fulfil his/her duties.²⁴

Austria does not have a legally-based minimum wage. Collective agreements settle for every labour sector specific levels of income, which are not allowed to be undermined.²⁵ Collective agreements are adopted by unions or associations representing the employers’ interests and unions representing employees and should ensure a balance of interests.²⁶

Protection of employees can be divided into three areas: protection against risks at the work place, protection regarding working time and protection regarding the form of required work. This encompasses, for example, restrictions for pregnant workers or forms of work adequate for children and adolescents.²⁷ Regulations regarding protection against risks are controlled by labour inspectorates according to the Act on the Protection of Employees^{28, 29}. Based on a law on working time, the usual daily working time is eight hours; the weekly working time of 40 hours may not be exceeded. It is possible to work ten hours a day, but the weekly limit of 40 hours must not be

²⁴ H. Krejci, in Peter Rummel, *Commentary of the Civil Code* (3rd edn, Manz, Vienna, 2007) s. 1151(6).

²⁵ W. Brodil, M. Risak and C. Wolf, *Arbeitsrecht in Grundzügen* (6th edn, LexisNexis, Vienna 2010)(248).

²⁶ W. Brodil, M. Risak and C. Wolf, *Arbeitsrecht in Grundzügen* (6th edn, LexisNexis, Vienna 2010)(113).

²⁷ W. Brodil, M. Risak and C. Wolf, *Arbeitsrecht in Grundzügen* (6th edn, LexisNexis, Vienna 2010)(310).

²⁸ Federal Law Gazette I No. 450/1994 as amended by Federal Law Gazette II No. 221/2010.

²⁹ W. Brodil, M. Risak and C. Wolf, *Arbeitsrecht in Grundzügen* (6th edn, LexisNexis, Vienna 2010)(315).

exceeded.³⁰

Participation of non-nationals in the Austrian labour market

Austrian laws on migration classify migrants in different categories and distinguish between EU citizens, Convention refugees who have been granted asylum, migrants from countries with bilateral or association agreements with Austria,³¹ and other third-country citizens.³² Entry, residence and settlement in Austria are regulated by the Settlement and Residence Act (SRA)³³ as well as by the Aliens' Police Act (APA).³⁴ Entry into the labour market by migrants is regulated by the Alien Employment Law (AEL).³⁵ Within this rather complex system of laws, several intersections, dependencies and also inconsistencies exist. In general, all persons who are non-citizens of Austria or of any other EU Member State need specific permission to enter the labour market.³⁶

However, for citizens of new EU Member States, access to the labour market is limited. For these citizens, except Malta and Cyprus, the regulations of the AEL apply in respect of access to the labour market. The AEL was, with some exceptions, applicable for citizens of Hungary, Poland, Czech Republic, Slovakia, Slovenia, Estonia, Lithuania and Latvia until the end of April 2011, and for citizens of Romania and Bulgaria until the end of December 2011.³⁷

For third country nationals in general, seven different forms of work permissions exist, which are based on the SRA and the AEL.³⁸ The first level forms the temporary work permit (*Beschäftigungsbewilligung*) which is requested by the employer at the Austrian Employment Service (AES). It allows

³⁰ Cf. Act on Working Time, Federal Law Gazette No. 461/1969 as amended by Federal Law Gazette I No. 149/2009, s. 3 and 4.

³¹ Eg Turkey.

³² Forschungs- und Beratungsstelle Arbeitswelt, *Austria Country Report, Undocumented Worker Transitions* (Report) (July 2007) 7.

³³ Federal Law Gazette I No. 100/2005 as amended by Federal Law Gazette I No. 122/2009.

³⁴ Federal Law Gazette I No. 100/2005 as amended by Federal Law Gazette I No. 135/2009.

³⁵ Federal Law Gazette I No. 218/1975 as amended by Federal Law Gazette I No. 135/2009.

³⁶ A. Binder, 'Zirkuläre Migration in die Gemüsebauggebiete Österreichs' (Thesis, University of Vienna 2008) p. 43.

³⁷ General Information of the Federal Ministry of Labour, Social Affairs and Consumer Protection on employment of EU citizens
<http://www.bmask.gv.at/cms/site/attachments/9/8/5/CH0688/CMS1236265784545/2010-07-26_beschaeftigung_von_arbeitskraeften_aus_den_neuen_eu-mitgliedstaaten.pdf> accessed 24 November 2010.

³⁸ Not all of them are discussed within this report, such as the access to the labour market as key person (*Schlüsselkraft*).

employment with a certain company for a maximum of one year.³⁹ Several prerequisites, such as the fulfilment of a specific quota for migrant workers allowed in the Austrian labour market, make it especially difficult to obtain a temporary work permit.⁴⁰ In addition, the temporary work permit can only be granted after an assessment of the labour market (*Arbeitsmarktpriifung*). This assessment includes questioning whether current developments within the labour market would allow the employment, and whether public interests would oppose employment.⁴¹

The next level would be the work permit (*Arbeitserlaubnis*), which allows for work in one federal province of Austria for a maximum of two years. The migrant can apply for it her-/himself at the Austria Employment Service. The migrant must have been employed prior in Austria for a specific period of time and needs to lawfully reside in Austria.⁴² Following this, a certificate of exemption (*Befreiungsschein*) could be issued to the migrant, which allows work all over Austria for five years. Lawful title to settlement is again a prerequisite, and – among further requirements – a prior legal employment of at least five years in the preceding eight years in Austria is necessary.⁴³

AEL s. 29 foresees that migrants who are working but do not fulfil the requirements of the AEL or SRA are entitled to the same claims as persons with a regular working contract. Working contracts between an employer and employee which do not fulfil all criteria of the AEL or SRA are usually considered void. With regard to claims such as wages, the employee has the same status as if she/he had a valid working contract.⁴⁴

The Act on the adaption of employment contract law (*Arbeitsvertragsrechts-Anpassungsgesetz*)⁴⁵ states in s. 7b that posted workers coming from abroad and working in Austria have specific minimum claims. These claims encompass a minimum wage, which is usually paid at the place of work, thus in Austria, as well as paid leave and working hours based on collective agreements. This section should prevent dumping of wages due to different levels of average wages.

³⁹ Forschungs- und Beratungsstelle Arbeitswelt, *Austria Country Report, Undocumented Worker Transitions* (Report) (July 2007) p. 8.

⁴⁰ D. Einwallner and T. Neugschwendtner, *EU-Recht und ausländische ArbeitnehmerInnen – muss Österreich handeln?* (OEGB Vienna 2009) p. 59.

⁴¹ Cf. AEL s 4(1).

⁴² D. Einwallner and T. Neugschwendtner, *EU-Recht und ausländische ArbeitnehmerInnen – muss Österreich handeln?* (OEGB Vienna 2009) pp. 61–62.

⁴³ D. Einwallner and T. Neugschwendtner, *EU-Recht und ausländische ArbeitnehmerInnen – muss Österreich handeln?* (OEGB Vienna 2009) p. 65.

⁴⁴ R. Dittrich and H. Tades, *Arbeitsrecht* (2nd edn, Manz, Vienna 2010) AEL s. 29(E)(8).

⁴⁵ Federal Law Gazette No. 459/1993 as amended by Federal Law Gazette I No. 29/2010.

Participation of victims of THB in the Austrian labour market

Improving access to the labour market for victims of THB is part of the National Action Plan and therefore part of discussions.⁴⁶ In general, victims of THB who stay longer in Austria and require access to labour market is rather small.

Victims of THB coming from the new EU Member States need to have a specific confirmation of registration (*Anmeldebescheinigung*)⁴⁷ regarding their residence and had to obey the AEL until April 2011 or in the case of Romania and Bulgaria have to do so until December 2011. This means that certain quota may not be exceeded and an assessment of the labour market must be enacted before a temporary working permit can be issued.

Third country nationals can after one year get an unlimited authorisation of settlement (*Niederlassungsbewilligung-unbeschränkt*), which is based on certain prerequisites.⁴⁸ The unlimited authorisation of settlement allows for unlimited access to the labour market.⁴⁹

As indicated above, access to the labour market is *inter alia* regulated by specific quotas. Under certain circumstances, the maximum numbers of permits can be exceeded, according to a specific regulation (*Bundeshöchstzahlüberziehungsverordnung*). The Task Force suggests amending this regulation to include a specific provision for victims of THB. Experience of LEFOE-IBF shows that obtaining temporary work permits (*Beschäftigungsbewilligungen*) for low-skilled jobs is very difficult.⁵⁰ In 2009, only one temporary work permit was issued to a woman supported by LEFOE-IBF.⁵¹ Recently, a draft amendment to the AEL was presented by the Ministry of Labour, Social Affairs and Consumer Protection.⁵² This amendment foresees that victims of THB can also get a temporary working permit when quota are exceeded. This measure

⁴⁶ Cf. National Action Plan against Human Trafficking, IV.3 <http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/2-Aussenpolitik_Zentrale/Menschenrechte/TFM_Aktionsplan_engl_V20091007_LAYO_UT_FINAL.pdf> accessed 2 February 2011.

⁴⁷ For further information see G. Cristinel Zaharia, *Combating Trafficking in Human Beings for Labour Exploitation in Romania*, Chapter 3, para 2.2 in this book.

⁴⁸ For further information see G. Cristinel Zaharia, 'Combating Trafficking in Human Beings for Labour Exploitation in Romania', Chapter 3, paras 2.2 in this book.

⁴⁹ Cf. AEL s. 17 and SRA s. 8(2)(3).

⁵⁰ Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) pp. 11-12.

⁵¹ Cf. LEFOE-IBF, *2009 Annual Report* (Vienna 2010) p. 27.

⁵² <<http://www.bmask.gv.at/cms/site/dokument.html?channel=CH0175&doc=CMS1291907038590>> accessed 2 February 2011.

should ensure that victims of THB have easier access to the labour market with no assessment of the labour market needing to be done.⁵³

Regulation of specific sectors

Regarding *seasonal work in tourism and agriculture*, specific work permits are issued in order to be able to answer the higher demand for workers during high seasons in tourism and harvesting times.⁵⁴ The quotas for these short-term permits are regulated in decrees for each season.⁵⁵ The short-term permit can be issued for a maximum of six months. In exceptional cases, the migrant can get a permit for up to nine months. For harvesting, shorter permits can be issued; harvesting permits are valid for a maximum of six weeks.⁵⁶ The harvesting permit can only be issued to citizens of countries who can enter Austria without any further entry permit or visa requirement (*sichtvermerksfreie Einreise*⁵⁷).⁵⁸ In 2009, the AES granted in total around 65.000 short term permits for the tourism sector (winter/summer), for harvesting, forestry and agriculture.⁵⁹ Wages within these short-term permits are based on collective agreements.⁶⁰ For the province of Styria, the monthly wage of an unskilled worker in agriculture would be € 1.109,50 (pre-tax).⁶¹ Since March 2010, a seasonal agricultural worker in the provinces of Vienna, Lower Austria and

⁵³ Amendment to the AEL, introductory and commentary to the amendments, p. 6 <http://www.bmask.gv.at/cms/site/attachments/7/7/9/CH0175/CMS1291907038590/vorblatt_und_erlaeuterungen.pdf> accessed 2 February 2011.

⁵⁴ Cf. AEL s. 5(1).

⁵⁵ Cf. Decree on employment of migrants in tourism (Federal Law Gazette II 351/2010). It states that in November 2010 for the upcoming winter tourism season 5895 short-term permits can be issued. The quota are divided according to the demand to the provinces of Austria.

⁵⁶ General Information of the Federal Ministry of Labour, Social Affairs and Consumer Protection on employment of EU citizens <http://www.bmask.gv.at/cms/site/attachments/9/8/5/CH0688/CMS1236265784545/2010-07-26_beschaeftigung_von_arbeitskraeften_aus_den_neuen_eu-mitgliedstaaten.pdf> accessed 24 November 2010.

⁵⁷ This would encompass all EU Member States (including 'new' Member States) and numerous third states such as Croatia and (under further certain requirements) Serbia, Montenegro and FYROM.

⁵⁸ Cf. AEL s. 5(1)(2).

⁵⁹ Austrian Employment Service, 2009 Annual Report (Vienna 2010) p. 47 <http://www.ams.at/_docs/Die_Auslaenderbeschaeftigung.pdf> accessed 24 November 2010.

⁶⁰ A. Binder, 'Zirkuläre Migration in die Gemüsebauggebiete Österreichs' (Thesis, University of Vienna 2008) p. 50.

⁶¹ Cf. Chamber of workers in forestry and agriculture Styria <http://www.landarbeiterkammer.at/steiermark/_lccms/_00132/KV-Agrar.htm?VER=100201180547&MID=135&LANG=lak> accessed 24 November 2010.

Burgenland has to receive, according to the collective agreement, a daily wage of € 39,75.⁶²

Despite the regulations on working times and collective agreements, working conditions in harvesting are poor. Excessive working hours are reported, living conditions are bad and passports are taken away and locked during the harvest season.⁶³

Concerning the social benefits, persons holding a harvesting permit are not protected fully by the social security system (including insurance of sickness, work-related accidents and pensions).⁶⁴ Additionally harvest helpers and seasonal workers are not entitled to receive unemployment benefits, since they are not lawfully residing after the time period of the permit.⁶⁵ It is shown, that seasonal workers and harvest helpers do not make use in general of the social benefits. In case they would make use of rights such as paid leave or payment during sickness, they would run the risk to lose the job immediately or to not get the job next summer.⁶⁶

In order to reorganise the *care sector* in Austria, a specific Home Care Law (HCL) was introduced in 2007.⁶⁷ Before the HCL entered into force, 24 hour-care at home was usually organised by two women alternatively working for two weeks. During the time one of the women works in Austria, the other goes back to her home country. This system worked until 2007 without any legal basis and was illegal. Working without any contract, the women had no possibility to claim for adequate wages or social benefits and faced exploitation.⁶⁸ The new HCL seeks to decriminalise the system of 24 hour-care at home. It

⁶² Collective Agreement between the Trade Union (PRO-GE) and the chamber of employers

<http://www.proge.at/servlet/BlobServer?blobcol=urldokument&blobheadername1=content-type&blobheadername2=content-disposition&blobheadervalue1=application%2Fpdf&blobheadervalue2=inline%3B+filename%3D%22Lohntabelle_f%25C3%25BCr_die_landwirtschaftlichen_SaisonarbeiterInnen_in_den_landwirtschaftlichen_Betrieben_der_Bundesl%25C3%25A4nder_Nieder%25C3%25B6sterreich%252C_Burgenland_und_Wien.pdf%22&blobkey=id&root=P01&blobnocache=false&blobtable=Dokument&blobwhere=1257346755789> accessed 24 November 2010.

⁶³ D. Behr, 'Saisonniers und ErnehelferInnen im Marchfeld' in Gétaz Raymond (ed), *Bittere Ernte* (Europäisches BürgerInnenforum, CEDRI 2004) pp. 73-79.

⁶⁴ Cf. General Social Insurance Act s. 5(1)(13) (Federal Law Gazette I No. 189/1955 as amended by Federal Law Gazette I No. 92/2010).

⁶⁵ Cf. D. Einwallner and T. Neugschwendtner, *EU-Recht und ausländische Arbeitnehmerinnen – muss Österreich handeln?* (OEGB Vienna 2009) p. 101.

⁶⁶ D. Behr, 'Saisonniers und ErnehelferInnen im Marchfeld' in Gétaz Raymond (ed), *Bittere Ernte* (Europäisches BürgerInnenforum, CEDRI 2004) p. 78.

⁶⁷ Federal Law Gazette I No. 33/2007 as amended by Federal Law Gazette I No. 57/2008.

⁶⁸ F. Drott, 'Pflegerinnen aus Osteuropa gesucht' (Thesis, University of Vienna 2009) pp. 35-36.

enables the employment of a care person and offers also the opportunity to work as a care person self-employed.⁶⁹ The possibility to be self-employed was highly criticised and is seen as a form of bogus self-employment since in most cases the women are personally and economically dependent.⁷⁰ Self-employment leads to undermining standards of labour law and legitimising precarious and exploitative labour conditions.⁷¹ Figures show that the system of self-employment is more popular than the employment option. In 2007, around 300 employed persons were registered, but in August 2008 around 11.000 self-employed persons are reported.⁷² The law foresees exceptions of labour law standards and explicitly takes advantage of differences in wages in Austria and eastern countries and leads to exploitation based on gender and ethnic discrimination.⁷³

1.2.3 Migration law

Smuggling

The definition of smuggling can be found in the Aliens' Police Act (APA) s. 114. Smuggling and THB are often discussed in the general THB-discourse as two different offences which need to be clearly distinguished. Looking at the Austrian regulation on smuggling, the wording of the offence precludes confusion.

In short, the perpetrator is punished in cases when the person organises the illegal entry to, or transit through, Member States of the EU and neighbouring countries of Austria. The perpetrator must intend to profit from 'organizing'. Organizing includes every service for the smuggled person which supports the illegal entry or transit. This includes the organisation of forged documents, maps, transportation in cars or providing smuggled persons with basic needs.⁷⁴

Exploitation of a foreigner

A provision which is also closely linked to trafficking in human beings is also dealt with in the APA. The offence punishes the 'exploitation of a foreign person' (APA s. 116). This offence is categorised in the APA because it is argued that this offence can also be closely linked to smuggling (APA s. 114)

⁶⁹ F. Drott, 'Pflegerinnen aus Osteuropa gesucht' (Thesis, University of Vienna 2009) p. 39.

⁷⁰ F. Drott, 'Pflegerinnen aus Osteuropa gesucht' (Thesis, University of Vienna 2009) p. 49.

⁷¹ F. Drott, 'Pflegerinnen aus Osteuropa gesucht' (Thesis, University of Vienna 2009) p. 56.

⁷² A. Buchinger, 'Der irreguläre Pflegearbeitsmarkt' (Thesis, University of Vienna 2009) p. 146.

⁷³ F. Drott, 'Pflegerinnen aus Osteuropa gesucht' (Thesis, University of Vienna 2009) p. 80.

⁷⁴ A. Tipold, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) APA s. 114(10).

and usually follows smuggling.⁷⁵ Nevertheless, it is not necessary that the victim has been smuggled in order to apply APA s. 116.⁷⁶

The perpetrator takes advantage of the victim's specific dependency which is based on the fact that the foreign person is either illegally in the country, does not have a regular working permit or is in any other particular situation of dependency. The dependency of a victim is also apparent in cases where the foreigner can move freely and leave the exploiter, but cannot use this possibility out of fear or threat of being identified by authorities and possibly deported.⁷⁷

The interpretation of exploitation follows established case law on exploitation of victims within the framework of pimping.⁷⁸ As elaborated with regard to THB (CC s. 104a) above, the ruthless exploitation of vital interests of the victim is also necessary. Exploitation occurs when the victim receives only as much as being able to cover basic needs or nothing at all in the longer term. Excessive working hours or unacceptable working conditions can amount to exploitation. Taking advantage of the difference between average wages in Austria and the country of origin as such does not qualify as exploitation. *Excessiveness* is important – minor violations of limits (working hours, minimum wages) do not amount to exploitation.⁷⁹

A person who exploits a foreigner in order to receive continuous profits can be punished with a prison sentence of up to three years. The perpetrator can be punished with a prison sentence of six months up to five years in cases when she/he leads the foreigner to a situation of hardship or exploits a larger number of persons. The situation of hardship means that there is a shortage of food, housing, clothing and medical care. The foreigner is not able to provide for goods and services indispensable to life. A 'larger number of persons' means around ten victims.⁸⁰ If the exploitation causes the death of the foreigner, the perpetrator faces a minimum of one year up to a maximum of ten years imprisonment.

When directly comparing CC s. 104a and APA s. 116, following the elements of the definition of trafficking in human beings (*action-means-purpose*), it can be seen that only the element of *action* is not required in APA s. 116. All

⁷⁵ A. Tipold, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) APA s. 116(1).

⁷⁶ A. Tipold, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) APA s. 116(6).

⁷⁷ A. Tipold, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) APA s. 116(6).

⁷⁸ Cf. CC 216(2), A. Tipold, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) APA s. 116(7).

⁷⁹ A. Tipold, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) APA s. 116(8-9) (emphasis added).

⁸⁰ A. Tipold, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) APA s. 116 (11-13).

other elements of the definition need to be fulfilled also for APA s. 116. ‘Trafficking in human beings’ (CC s. 104a) foresees the usage of certain means which includes also the exploitation of situations of distress. These cover also situations of social distress, such as illegal residency.⁸¹ The purpose of APA s. 116 is to combat exploitation, although it is not further defined which forms of exploitation are covered.

Another difference concerns the definition of the victim: An Austrian citizen cannot be a victim of APA s. 116, since this person would not be a foreigner (as defined in APA s. 2 (4) (1)). On the other hand, ‘trafficking in human beings’ would also cover cases of internal trafficking and cases in which Austrian citizens are victims.

As also shown by interview, it is rather unclear in which cases ‘trafficking in human beings’ or ‘exploitation of a foreigner’ might be applied. As discussed above and also affirmed by the interview partner, the distinction between these two offences is rather difficult to define. One interview partner pointed out that in many cases both offences would be applicable. In particular, since both offences have the same levels of punishment, both offences could be applied.⁸²

In general, APA s. 116 is applied rather seldom. In recent years, the following numbers have been recorded regarding complaints under APA s. 116⁸³:

Year	2008	2009	Jan-Sept 2010
Registered complaints	3	8	2
Clarified complaints ⁸⁴	3	7	1

Since the numbers of complaints are low, also convictions of exploitation of a foreigner are rare. In 2007, three convictions were registered regarding the exploitation of a foreigner⁸⁵, in 2008 one conviction was registered, and none

⁸¹ K. Schwaighofer, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) CC s. 104(a)(6).

⁸² Interview with Ministry of Justice (July 2010).

⁸³ Information provided upon request by the Criminal Intelligence Service (Email correspondence 4 November 2010). The Criminal Intelligence Service publishes annually a report on criminality (including statistics and analysis).

⁸⁴ Complaints are clarified when the alleged criminal was caught in the act, or she/he confessed or other evidences lead to assumption that the person is the perpetrator as well as in the case when the alleged criminal cannot be found by the police but the identity is known and evidences lead to the assumption that the person is the perpetrator. Cf. Criminal Intelligence Service, *Report on Criminality 2006* (Report) (2007) A4.

⁸⁵ A. Tipold, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code* (2nd edn, Manz, Vienna 2006) APA s. 116(2). The convictions are registered for the provision in place before a major amendment of the APA (APA 1997 s. 105).

were recorded in 2009.⁸⁶ However, it has to be pointed out that the judicial criminal statistics only show the conviction of the principal offence in one proceeding.

1.3. The dimensions of Trafficking in Human Beings for labour exploitation in Austria

1.3.1 Characterisation of Trafficking in Human Beings for labour exploitation at the national level

Data on trafficking in human beings can be collected from various sources, but Austria does not collect such data comprehensively, as coordinated by one institution. Data on trafficking in human beings in general, as well as data on trafficking for labour exploitation in particular are scarce. Furthermore, the reports of the Austrian Task Force on Combating Human Trafficking give little information about trafficking for labour exploitation. Information collected in the interviews summarise the available information on both trafficking in human beings and situations in which exploitation and illegal employment take place and have been detected, but which have not necessarily been identified as trafficking in human beings.

Generally speaking, in Austria the most frequent forms of trafficking in human beings are trafficking for the purpose of sexual exploitation, slavery-like situations of domestic servants and child trafficking.⁸⁷ With regard to trafficking in children, traffickers exploit children in begging, committing theft and pick pocketing, prostitution and other forms of forced labour. Additionally, cases of trafficking in children linked to illegal adoption as well as for the purpose of marriage are detected.⁸⁸

Based on the available information and interviews, THB for labour exploitation and its forms in Austria can be described as follows:

The most frequently mentioned *sectors* in which THB for labour exploitation occurs are the catering sector, agriculture⁸⁹ and the construction sector⁹⁰. Further sectors are exploitation in households, including diplomatic

⁸⁶ Judicial criminal statistics 2008 and 2009 of Statistics Austria <http://www.statistik.at/web_de/dynamic/statistiken/soziales/kriminalitaet/verurteilungen_gerichtliche_kriminalstatistik/publikationen?id=6&webcat=176&nodeId=333&frag=3&listid=176> accessed 22 November 2010.

⁸⁷ Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 1.

⁸⁸ Austrian Task Force on Combating Human Trafficking, *Report by the Working Group on Child Trafficking* (2008) p. 1.

⁸⁹ Interview with NGO (August 2010).

⁹⁰ Interview with Ministry of Finance (August 2010).

households, and exploitation through forced begging.⁹¹ The media has reported on cases of THB for the purpose of exploitation in diplomatic households.⁹² Very few cases are monitored in the sector of cleaning services at construction sites and dismantling of industrial plants.⁹³

The *country of origin* of the victims seems to be linked to the sector in which victims are going to be exploited. Generally speaking, victims of trafficking in human beings for the purpose of labour exploitation seem to be third country nationals or citizens of new EU Member States. Romania is mentioned, for example, as a country of origin in cases of THB for the purpose of exploitation in begging⁹⁴ as well as with regard to exploitation in the construction sector.⁹⁵ Furthermore, Bulgaria, Slovakia⁹⁶, as well as Serbia and Macedonia⁹⁷ are mentioned. Countries of origin outside Europe would be Brazil, Columbia and Sri Lanka, Philippines, Thailand⁹⁸ and China⁹⁹.

The *gender of victims* is clearly linked to the sector in which the exploitation takes place. Most victims of trafficking in human beings are women and children. Areas which are prone to illegal employment and exploitation include the construction sector and the catering sector. Mirroring the classical gender segregation of the labour market, men are largely assumed to be affected within the construction sector, whilst more women than men are exploited in the catering sector.¹⁰⁰ At the same time, it has also been observed that more men are exploited in the catering sector¹⁰¹, for example in respect of those men who must pay off their smuggling.¹⁰² With regard to cases on exploitation in households, women are mostly affected.

Since documented cases of trafficking for the purpose of labour exploitation are rather scarce, information on the *age of victims* is predominantly based on general observations and the assumptions of the interview partners. Regarding women, it is assumed that the age structure is different for the group of women being exploited for the workforce than for the group of women being exploited sexually. Also, trafficked women around the age of 50 have been

⁹¹ Interview with regional Criminal Intelligence Service (November 2010) and interview with a public prosecutor (November 2010).

⁹² I. Brickner, 'Hilfe für ausländische 'Haussklavinnen' (Help for foreign 'houseslaves') *Der Standard* (Vienna 2 December 2009).

⁹³ Interview with Ministry of Finance (August 2010).

⁹⁴ Interview with regional Criminal Intelligence Service (November 2010) and interview with a public prosecutor (November 2010).

⁹⁵ Interview with Ministry of Finance (August 2010).

⁹⁶ Interview with Criminal Intelligence Service (September 2010).

⁹⁷ Interview with Control Unit for Illegal Employment (August 2010).

⁹⁸ Interview with Criminal Intelligence Service (September 2010).

⁹⁹ Interview with Ministry of Finance (August 2010).

¹⁰⁰ Interview with Ministry of Finance (August 2010).

¹⁰¹ Interview with Control Unit for Illegal Employment (August 2010).

¹⁰² Interview with regional Criminal Intelligence Service (November 2010).

identified, who have been exploited in households.¹⁰³ Persons who are exploited are between 18 or 19 and 50 years old.¹⁰⁴ Regarding trafficking in children, the crisis centre of the Viennese youth welfare authority, called 'Drehscheibe', takes care of trafficked children and such children are in most cases under the age of 14, which is the age of criminal responsibility.¹⁰⁵

A difference between trafficking for the purpose of sexual exploitation and labour exploitation regarding *recruitment* is that victims of labour exploitation are usually not deceived regarding the form of promised work. When jobs in households are promised, then this is the work the victim is later exploited in.¹⁰⁶ In the case of begging, victims generally know that begging will be a way of earning money. It is understood that payments have to be made for housing, for example.¹⁰⁷ However, the conditions of work in Austria are clearly misrepresented by the traffickers and working hours exceed that promised, earnings are less and services are overcharged. In some cases of trafficking in women who have been exploited in households, double the actual wage received, as well as vocational training, has been promised. Exploitation in households seems to depend a lot on informal contacts among family and friends. Traffickers and exploited persons often come from the same country. Systems of recruitment agencies or labour brokerage are not monitored in Austria regarding domestic work.¹⁰⁸

Forms of coercion or force in the exploitation of domestic work can be understood in terms of isolation and permanent control. In one case, a woman was permanently observed by the exploiters and could not make a phone call in privacy. In another case, the woman was not allowed to leave the house alone. Generally, a very strong dependency prevents the victim from fleeing: on the one hand, there is the urgent need to earn money, and on the other hand the exploited person does not know whether the exploiter will actually pay. In informal employment, no regulations are provided regarding the day of payment or the amount to be paid. The victim may realise very late that the promised payments will not take place as agreed. Exploitation in domestic work and catering is often linked with sexual violence.¹⁰⁹ But at the same time, if there is a legal working contract this may be used as a pressuring tool. Quitting the contract of foreign workers can lead to the loss of the working

¹⁰³ Cf. Interview with NGO (August 2010).

¹⁰⁴ Cf. Interview with Criminal Intelligence Service (September 2010).

¹⁰⁵ M. Ammer, M. Nowak, FRA Thematic Study on Child Trafficking, Austria (2008) (34) <<http://fra.europa.eu/fraWebsite/attachments/Child-trafficking-09-country-at.pdf>> accessed 23 November 2010.

¹⁰⁶ Cf. Interview with NGO (August 2010).

¹⁰⁷ Cf. Interview with a public prosecutor (November 2010).

¹⁰⁸ Cf. Interview with NGO (August 2010).

¹⁰⁹ Cf. Interview with NGO (August 2010).

permit and consequently the right of residence.¹¹⁰ Another pattern of exploitation concerns the exploitation that occurs when paying off smuggling fees. Cases have been detected in Austria in which persons, predominantly from Asian countries, are forced to work in restaurants in order to pay off the fee, and are exploited at the same time.¹¹¹

1.3.2 Facts and Figures on Trafficking in Human Beings for labour exploitation in Austria

As already mentioned above, Austria does not have a comprehensive data collection system on THB. In general, figures exist regarding the conviction of perpetrators of ‘trafficking in human beings’ (CC s. 104a), registered by the Ministry of Justice, as well as regarding registered complaints (*Anzeige*) collected by the Federal Criminal Intelligence Service. However, these data do not provide information about the form of exploitation. Based on the information collected in the interviews, it can be assumed that within these numbers a considerable number may be trafficking for the purpose of sexual exploitation.

The criminal court statistics regarding ‘trafficking in human beings’ show the following:¹¹²

Year	2005	2006	2007
Total proceedings	16	33	18
Sentence	1	9	2
Dismissal of case	12	11	9
Acquittal	0	5	1
Pending proceedings	3	8	6

In the year 2009, two convicted perpetrators were registered.¹¹³

In addition to the judicial criminal statistics, the Criminal Intelligence Service provides statistics regarding complaints filed on THB. Four complaints were registered in the year 2008.¹¹⁴ The victims involved in these complaints were

¹¹⁰ Cf. Interview with Criminal Intelligence Service (September 2010).

¹¹¹ Cf. Interview with regional Criminal Intelligence Service (November 2010).

¹¹² Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 25.

¹¹³ Judicial criminal statistics 2008 and 2009 of Statistics Austria <http://www.statistik.at/web_de/dynamic/statistiken/soziales/kriminalitaet/verurteilungen_gerichtlich_e_kriminalstatistik/publikationen?id=6&webcat=176&nodeId=333&frag=3&listid=176> accessed 22 November 2010 Regarding 2008 no data on CC s. 104(a) are given. Note that within the criminal statistics only the proceedings of the leading provision/gravest crime are given.

¹¹⁴ Criminal Intelligence Service, *Report on Criminality 2008* (Report) (2009) B2. All 4 complaints have been clarified.

two women and two men.¹¹⁵ The number rose significantly in 2009, when 32 complaints were registered. Up until September, 13 complaints were reported for 2010.¹¹⁶

Additionally, the NGO LEFOE-IBF¹¹⁷ provides statistics in its annual report about the number of women who received counselling and support. However, giving an impression of the dimension of trafficking in women in general, these numbers do not differentiate between women who have been sexually exploited and those exploited in other sectors of labour. It can be assumed that the vast majority concerns sexually exploited women.

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of women supported ¹¹⁸	143	183	208	142	167	151	162	170	203	182

Regarding child trafficking, little reliable comparative data exists.¹¹⁹ The data above, collected by the Ministry of Justice and the Criminal Intelligence Service, does not indicate whether children have been involved in criminal proceedings. The crisis centre for the Viennese youth welfare authority called ‘Drehscheibe’ provides data on trafficked children and accompanied minors who have been identified in Vienna and taken care of. The ‘Drehscheibe’ registers in its statistics all unaccompanied minors without housing who were used for criminal activities in Vienna, identified by the police and then brought to the ‘Drehscheibe’. The numbers amounted to 315 in 2004, 701 in 2005, 319 in 2006 and 72 in 2007.¹²⁰ According to ‘Drehscheibe’, the numbers decreased because of the good cooperation between the

¹¹⁵ Criminal Intelligence Service, *Report on Criminality 2008* (Report) (2009) B 22-23. All victims have been older than 18 years.

¹¹⁶ Information provided upon request by the Criminal Intelligence Service (E-mail correspondence 24 November 2010).

¹¹⁷ LEFOE-IBF is an intervention centre for trafficked women based in Vienna and recognised victim protection institution acting on behalf of the Ministry of Interior and the Federal Chancellery of Austria. LEFOE-IBF is mandated by the Ministry of Justice to provide psycho-social and legal assistance to trafficked women.

¹¹⁸ Information based on the annual reports of LEFOE-IBF. Cf. LEFOE-IBF, *2008 Annual Report* (Vienna 2009) p. 12.

¹¹⁹ M Ammer, M Nowak, FRA Thematic Study on Child Trafficking, Austria (2008)(32) <<http://fra.europa.eu/fraWebsite/attachments/Child-trafficking-09-country-at.pdf>> accessed 23 November 2010.

¹²⁰ Austrian Task Force on Combating Human Trafficking, *Report by the Working Group on Child Trafficking* (2008) p. 10.

‘Drehscheibe’ and Bulgarian authorities.¹²¹ Since all children are registered, it is also possible that not all of them are victims of child trafficking.

1.4 Summary of the findings

1.4.1 Identified obstacles

Austria’s policies and measures against trafficking in human beings still seem to be driven predominantly by the notion that trafficking in human beings is linked mostly to exploitation of women, predominantly sexual exploitation, and that trafficking in human beings necessarily needs to encompass a certain level of force, threat and confinement of the victim.

In Austria, the main regulation on THB is CC s. 104a. In addition, further offences are relevant with regard to THB. The most relevant offence is CC s. 217, the ‘transnational prostitution trade’. Prior to the newly introduced offence on THB (CC s. 104a) in the Criminal Code in 2004, the ‘transnational prostitution trade’ was used for THB. Since this offence was too narrow according to the Palermo Protocol, a new regulation had to be introduced. Although CC s. 217 does not fall directly within the scope of THB for labour exploitation, it offers the opportunity to show that there are significantly more legal proceedings on ‘transnational prostitution trade’ than on THB. Clearly, CC s. 217 covers THB for the purpose of sexual exploitation. THB for sexual exploitation is obviously more present in Austria’s policies on anti-trafficking than THB for labour exploitation. Whereas – as shown above – in total 18 proceedings on THB were registered in 2007, 524 proceedings were registered regarding ‘transnational prostitution trade’.¹²²

Cases on THB for labour exploitation are rather rare according to the information gathered. CC s. 104a is not very often applied in cases – as shown above, the numbers are rather low.

Additionally, the official statistics on CC s. 104a give no information on the respective form of exploitation.

Also relevant to THB is the regulation on ‘exploitation of a foreign person’ (APA s. 116). This offence seems to be of minor importance according to the official numbers and the information gathered in the interviews.

In both cases (CC s. 104a and APA s. 116) it seems that the interpretation of the term ‘exploitation’ is rather challenging. The application of ‘exploitation’ in order to be able to file a complaint and then to bring an indictment is seen as difficult. The jurisdiction on exploitation is in general

¹²¹ Cf. Austrian Task Force on Combating Human Trafficking, *Report on the Working Group on Child Trafficking* (2008) p. 10.

¹²² Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 26.

based on the exploitation of victims within pimping. The given case law – as described above – gives specific indicators on when exploitation might have occurred. With regard to APA s. 116, the element of *excessiveness* is important, since minor violations of limits (working hours, minimum wages) do not amount to exploitation. But in practice, the application of both offences is seen as difficult, since the term ‘exploitation’ is still very vague.¹²³ The limits of excessiveness are not clear. In cases of ‘exploitation of a foreign person’ it is difficult to gather the evidence indicating very low wages, for example. Usually, no further information or notes are provided in respect of paid wages.¹²⁴ The evidence of the victim is very important in these cases. In one case, the decisive element of exploitation resulted from the fact that the perpetrators charged high fees for services or documents which would have been issued by the public authority to the victims free of charge. The imbalance between fees charged by the perpetrators and the services or housing offered in return to the victims was decisive with regard to the exploitation.¹²⁵ The vagueness of the term ‘exploitation’ might in some cases be combined with a lack of awareness on THB, which can lead consequently to less cases that are assessed as THB.

The CCLA, which regulates the criminal liability of legal persons in Austria, is applied very seldom. Corporate liability can play a very important role in combating THB for labour exploitation.

Within agriculture, the working conditions of migrants are in general described as rather poor. Reports show that seasonal workers and harvest helpers can in practice not make use of their – anyway limited – social benefits. Migrant workers in agriculture are in a situation of dependency due to the residence regulations in this sector. It can be assumed that there are probably more cases of THB within the agricultural sector in Austria than currently reported. Usually, the agricultural sector is prone to conditions of exploitation, but only very few concrete cases are known and documented.¹²⁶

1.4.2 Good practices

The Austrian Task Force on Combating Human Trafficking is the coordinating body for all efforts against THB in Austria and includes all relevant institutions, ministries and NGOs. The regular exchange allows current trends and developments to be discussed.¹²⁷ Issues or identified gaps are included in the National Action Plan.

¹²³ Cf. Interview with Criminal Intelligence Service (September 2010).

¹²⁴ Cf. Interview with regional Criminal Intelligence Service (November 2010).

¹²⁵ Cf. Interview with a public prosecutor (November 2010).

¹²⁶ Cf. Case study 2.

¹²⁷ For further information on the Task Force see M. Heemskerk and C. Rijken, ‘Combating Trafficking in Human Beings for Labour Exploitation in The Netherlands’, Chapter 2, para 1 in this book.

The identified obstacles with regard to the application of CC s. 104 a are included in the National Action Plan. The Ministry of Justice, in cooperation with other relevant ministries, reviews all regulations which are relevant for THB with a view defining THB, and elaborates recommendations regarding the application of these regulations.¹²⁸

In order to improve the situation on statistics regarding THB in Austria, a working group was established. Coordinated by the Ministry of Justice, several institutions that are relevant regarding official crime statistics are involved.¹²⁹ This measure is based on the National Action Plan, which foresees the improvement of data.¹³⁰ In addition, the National Action Plan requires the Ministry of Interior to further improve the collection of data with a view to standardizing the collection of data on THB in the EU.¹³¹

¹²⁸ Cf. National Action Plan against Human Trafficking, V.4 <http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/2-Aussenpolitik_Zentrale/Menschenrechte/TFM_Aktionsplan_engl_V20091007_LAYOUT_FINAL.pdf> accessed 30 November 2010.

¹²⁹ Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 26.

¹³⁰ Cf. National Action Plan against Human Trafficking, VII.2 <http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/2-Aussenpolitik_Zentrale/Menschenrechte/TFM_Aktionsplan_engl_V20091007_LAYOUT_FINAL.pdf> accessed 30 November 2010.

¹³¹ Cf. National Action Plan against Human Trafficking, VII.1 <http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/2-Aussenpolitik_Zentrale/Menschenrechte/TFM_Aktionsplan_engl_V20091007_LAYOUT_FINAL.pdf> accessed 30 November 2010.

Part II

Cooperation in the investigation and prosecution of cases of Trafficking in Human Beings for labour exploitation

2.1 Actors involved in investigating and prosecuting Trafficking in Human Beings for labour exploitation

Actors who are involved in the investigation and prosecution of cases of THB for labour exploitation may differ from those actors usually involved in cases of THB for sexual exploitation. In Austria, the Task Force on combating human trafficking consists of representatives from all relevant ministries, the federal provinces and non-governmental organisations. The group is headed by the Federal Ministry for European and International Affairs (FMEIA); consequently, the FMEIA coordinates all meetings and tasks. Additionally, the first high-ranking Austrian National Coordinator on Combating Human Trafficking¹³² was appointed in 2009 to ensure external visibility and general awareness of the work of the Task Force. The group meets regularly and aims to enhance cooperation between all actors and intensify the measures taken by Austria in order to combat THB. In addition to the regular meetings, the Task Force has also set up two specific working groups; one group deals with trafficking in children, and the other group addresses prostitution.¹³³ In particular, the tasks of the group are determined by the second National Action Plan against Human Trafficking covering the time between 2009 and 2011, which also includes a section on criminal prosecution. Awareness raising regarding THB for labour exploitation also falls within the activities of the Task Force. Although not one of the first ‘core-members’ of the Task Force of 2004, the Ministry of Finance has for several years taken part in the meetings of the Task Force, since the ministry has important functions with regard to THB for labour exploitation. The *Control Unit for Illegal Employment*, forms part of the Ministry of Finance, and plays a role in respect of THB for labour exploitation.

The *Federal Criminal Intelligence Service (Bundeskriminalamt)* forms part of the Federal Ministry of Interior. Within the division dealing with investigation, organised and general crime, one department is occupied with THB and smuggling.¹³⁴ This ‘Central Service for Combating Human Smuggling/Human Trafficking’ serves *inter alia* as a contact point for THB,

¹³² Director-General Ambassador Dr. Elisabeth Tichy-Fisslberger.

¹³³ Cf. <http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/2-Aussenpolitik_Zentrale/menschenrechte/TFM_Aktionsplan_engl_V20091007_LAYOUT_FINAL.pdf> accessed 30 November 2010.

¹³⁴ Cf. Overview of the Federal Criminal Intelligence Service <http://www.bmi.gv.at/cms/BK/wir_ueber_uns/organigramm/files/BK_Organigramm_Juli_2010.pdf> accessed 30 November 2010.

and runs a hotline which operates 24 hours a day. This newly established hotline should not be understood as an emergency hotline; it should rather encourage everyone (also anonymously) to forward information on THB to the police.¹³⁵

At the level of federal provinces the Regional Criminal Police Offices (*Landeskriminalamt*) have a special investigation section (investigation section No 10) for dealing with THB. This section is the central investigation body in each of the nine federal provinces dealing with THB. Every lead received by any police officer has to be forwarded to the specialist criminal officers. In general, the investigation is driven by the general principle that criminal police and the public prosecutor have to examine *ex officio* any crime which comes to their attention.¹³⁶

In order to improve the exchange of information and experiences the Federal Criminal Intelligence Service organises trainings at police stations at the provincial level in order to inform police officers on the ground. The internal rules on training foresee that the investigating officers of the competent special investigation of the individual Regional Criminal Police Office are informed twice a year about new developments in THB, and that legal and tactical aspects of current issues are addressed and pending investigations are discussed. At least once a year, the heads of the special investigation section participate in a comprehensive exchange of information and experiences with *inter alia* non-governmental organisations and representatives of the judiciary.¹³⁷ Consequently, possibilities for further training are provided internally. Courses are announced regularly and police officers can apply. Additionally, courses at European level or abroad may be attended. However, specific courses on THB for labour exploitation are not offered.¹³⁸

The Task Force's report indicates several trainings for the judiciary on THB. These trainings include *inter alia* seminars with LEFOE-IBF, held once every two years, as well as a seminar in another province of Austria or a seminar organised with the help of the Council of Europe.¹³⁹ So far, no specific seminar on THB for labour exploitation has been conducted. Although there was one planned, the minimum number of participants was not attained. The demand for trainings on THB seems to be rather low, since

¹³⁵ Cf. Criminal Intelligence Service, News, <http://www.bmi.gv.at/cms/BK/presse/files/18102010_Kampf_gegen_Menschenhandel_Meldestelle_und_Hotline_im_Bundeskriminalamt.pdf> accessed 30 November 2010.

¹³⁶ Based on CCP s. 2.

¹³⁷ Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 18.

¹³⁸ Cf. Interview with regional Criminal Intelligence Service (November 2010) and interview with Criminal Intelligence Service (September 2010).

¹³⁹ Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 18.

the number of cases of THB within the judiciary is in general low. THB plays only a minor role in the daily work life of public prosecutors and judges. Demanding workloads and the low level of importance given to THB cases mean there is little demand for seminars on THB.¹⁴⁰

The *Control Unit for Illegal Employment* was established in the early 1990s and has since been reorganised several times. It is under the supervision of the custom authorities at the Federal Ministry of Finance. In recent years, the Control Unit has expanded.¹⁴¹ Around 300 persons are currently working for the Control Unit. In comparison with Germany, this figure is rather low, since the density of control in Germany is twice that of Austria.¹⁴² The recently adopted Act on Anti-Fraud 2010 (*Betrugsbekämpfungsgesetz*)¹⁴³ foresees a major amendment to the function of the Control Unit. The unit will be further enlarged and will soon be part of a special Financial Police Force (*Finanzpolizei*). The Financial Police Force will basically have the same competences to enter premises as the Control Unit now has.¹⁴⁴ Compared to the Control Unit, which mainly deals with illegal employment, the Financial Police Force will have these competences for all purposes of taxation. Additionally, the force's competences are not limited to districts of the specific tax authorities; controls can, for example, be conducted all over Austria.¹⁴⁵

The Control Unit has several functions that have their basis in different legal acts. Within the framework of THB for labour exploitation, the following seem to be the most important: control of compliance with the AEL and the Act on the adaptation of employment contract law (*Arbeitsvertragsrechts-Anpassungsgesetz*), combating social insurance fraud¹⁴⁶ as well as support and participation in criminal proceedings as a witness or as an informant.¹⁴⁷ The main act is the AEL which provided for the Control Unit as the principal organ for the investigation of violations of the AEL. Other organs have the duty to support the Control Unit in its tasks within the AEL.¹⁴⁸ The control unit is, on the one hand, dealing with the AEL, whilst on the other with the control of fiscal law. Due to the different functions of the Control Unit,

¹⁴⁰ Interview with a public prosecutor (November 2010).

¹⁴¹ M. Jandl and others, *Migration and Irregular Work in Austria* (Amsterdam University Press, Amsterdam 2009) p. 56.

¹⁴² H. Houf, W. Lehner, *Handbuch KIAB –Kontrollen* (Manz, Vienna 2008)(4).

¹⁴³ Federal Law Gazette I No. 105/2010 adopted on 14 December 2010.

¹⁴⁴ Cf. Explanatory Notes 875 d.B. XXIV. GP 8 (government bill regarding the Act on Anti-Fraud 2010).

¹⁴⁵ HP. Lehofer, 'Die Finanzpolizei kommt', *OEJZ* 2010/78.

¹⁴⁶ This includes for example 'fraudulent withholding of social security duties' CC s. 153(d) (*Betrügerisches Vorenthalten von Sozialversicherungsbeiträgen und Zuschlägen nach dem Bauarbeiter-Urlaubs- und Abfertigungsgesetz*).

¹⁴⁷ H. Houf, W. Lehner, *Handbuch KIAB –Kontrollen* (Manz, Vienna 2008) p. 2.

¹⁴⁸ H. Houf, W. Lehner, *Handbuch KIAB –Kontrollen* (Manz, Vienna 2008) p. 18.

different procedural regulations have to be obeyed. This complicated situation can sometimes lead to uncertainty within an inspection for the employer, as well as for the inspectors themselves.¹⁴⁹

For the inspection itself, the unit is allowed to enter business premises and all rooms in which employees might work. This may also include the private home of the employer where there is a possibility that employees work there. Accommodation facilities for employees do not fall within the scope of the unit.¹⁵⁰ Employers also have to unlock specific rooms. Additionally, the number and names of foreigners being employed in the business by the employer can be requested.¹⁵¹ The assumption that a person is a foreigner allows the Control Unit to request the name, date of birth and address of the person. Before the inspection starts, the unit has to inform the employee.¹⁵² Most inspections are carried out when the Control Unit receives certain information beforehand. This information can come from private persons (e.g. neighbours) or unsuccessful bidders in tenders who lost because the successful bidder employs low-cost irregular workers. Additionally, information can also come from other authorities such as health and sanitary inspectors. As well as previously received information, the Control Unit also follows specific strategies and inspects all businesses of a certain branch in one area in a specific time period.¹⁵³ Controls have to be conducted in accordance with the protected right to privacy. Inspections of private homes in which employees work therefore raise several questions and the requirements are in general rather high in order for it to be permissible to enter a private home. Anonymous tips, for example, would not provide sufficient justification.¹⁵⁴ Irregular work in private households such as cleaning or caretaking is usually not inspected, since the Control Unit does not usually have access to private homes due to the high level of conditions. In the construction sector, common forms of irregularities include bogus self-employment while in the catering sector the underreporting of the extent of employment is also commonplace.¹⁵⁵

Since 2006, the Ministry of Finance has been organising seminars for the Control Unit specifically on trafficking in human beings, and has included the topic in its annual meeting of team leaders.¹⁵⁶ The seminars are seen as very

¹⁴⁹ H. Houf, 'Was steckt dahinter?' (2009) persaldo H1, p. 17.

¹⁵⁰ These can only be controlled by the labour inspections.

¹⁵¹ H. Houf, W. Lehner, *Handbuch KIAB –Kontrollen* (Manz, Vienna 2008) pp. 202–203.

¹⁵² H. Houf, W. Lehner, *Handbuch KIAB –Kontrollen* (Manz, Vienna 2008) pp. 206–207.

¹⁵³ M. Jandl and others, *Migration and Irregular Work in Austria* (Amsterdam University Press, Amsterdam 2009) p. 57.

¹⁵⁴ H. Houf, W. Lehner, *Handbuch KIAB –Kontrollen* (Manz, Vienna 2008) pp. 198–199.

¹⁵⁵ M. Jandl and others, *Migration and Irregular Work in Austria* (Amsterdam University Press, Amsterdam 2009) pp. 60–61.

¹⁵⁶ Cf. Interview with Ministry of Finance (August 2010).

important since they raise awareness about THB and give essential knowledge on the topic for implementation on a day-to-day basis.¹⁵⁷

The following authorities are also entitled to inspect workplaces and may therefore be relevant. The *Labour Inspectorate* is part of the Federal Ministry of Labour, Social Affairs and Consumer Protection, and encompasses around 500 staff members. The Labour Inspectorate's main mandate is the protection of the life and health of workers.¹⁵⁸ In order to fulfil its functions, the Labour Inspectorate is entitled to enter the premises of employers at any time. Additionally, it can also inspect the accommodation facilities of employees which are provided by the employer.¹⁵⁹ Inspections are conducted without prior notification of the employer, but the inspectors can decide to notify the inspection in advance. In some cases, it seems feasible to inform the employer in order to, for example, have the relevant persons present. But the majority of inspections in the construction sector are conducted without notification. Focusing on the construction sector, around 1000 construction sites are inspected per year.¹⁶⁰ The Labour Inspectorate has a special duty to keep information it receives confidential.¹⁶¹ THB for labour exploitation is not defined as a task within the scope of the Act on Labour Inspection.

The *District Health Insurance Fund* (Vienna) also includes the Department on Control of Contributions. This department investigates whether employers contribute the necessary payments for social insurance. The health insurance authority looks at specific information, such as whether all employees are registered.¹⁶² Specific attention is given to the question of whether employees are registered at the Health Insurance Fund accordingly.¹⁶³ Employers are obliged to provide all necessary information regarding social insurance.¹⁶⁴ The number of inspections has increased significantly this year, and the number of experts in the department has also increased. In the first half of 2010, 20 staff

¹⁵⁷ Cf. Interview with Control Unit for Illegal Employment (August 2010).

¹⁵⁸ Federal Ministry of Labour, Social Security and Consumer Protection, *Labour Inspectorate* (2009) <http://www.arbeitsinspektion.gv.at/NR/rdonlyres/F5C28318-D67E-4B52-AF95-12DAB1DF5125/0/arbig_d_gb_2009_Broschuere.pdf> accessed 30 November 2010.

¹⁵⁹ Cf. Act on Labour Inspection (Federal Law Gazette No. 27/1993 as amended by Federal Law Gazette I No. 150/2009) s. 4.

¹⁶⁰ Cf. Act on Labour Inspection s. 18 and interview with Labour Inspectorate (November 2010).

¹⁶¹ Cf. Act on Labour Inspection s. 3(6) and interview with Labour Inspectorate (November 2010).

¹⁶² Cf. General Social Insurance Act s. 41(a).

¹⁶³ Cf. District Health Insurance Fund (Vienna)

<http://www.wgkk.at/portal27/portal/wgkkportal/channel_content/cmsWindow?action=2&p_menuid=59454&p_tabid=6> accessed 30 November 2010.

¹⁶⁴ Cf. General Social Insurance Act s. 42.

members conducted around 1.800 on-site inspections. In the catering sector, in construction and in transportation, most of the unregistered employees were found. These sectors are in particular subject to inspections.¹⁶⁵

The *Construction Workers' Annual Leave and Severance Pay Fund* provides certain services primarily regulated under the Act on Construction Workers' Annual Leave and Severance Pay,¹⁶⁶ as well as further applicable collective agreements. The primary function of the fund is the settlement of annual leave remuneration, severance pay, winter holiday and bad weather compensation for construction workers. The fund receives contributions from employers; consequently the fund administrates the contributions and settles the workers' claims.¹⁶⁷ The claims are paid by the fund and not – as is normally the case – by the employer. Without having an intermediary fund between employer and construction worker, the risk would be too high that construction workers would not receive their claims due to very short periods of employment.¹⁶⁸ Since 2009, the fund has also the competence to undertake inspections at construction sites. The employer has to ensure access to all relevant information. Construction workers are obliged upon request to give their identity cards or passports to the fund while inspecting.¹⁶⁹ The act defines cooperation between the fund and the health insurance fund and states that the health insurance fund has to provide the construction workers' fund with data on employed workers. At the same time, the fund is allowed to use the database¹⁷⁰ of the Control Unit for Illegal Employment.¹⁷¹

¹⁶⁵ District Health Insurance (Vienna) press release 'District Health Insurance (Vienna) successful in combating illicit work and social fraud' (23 August 2010) <http://www.ots.at/presseaussendung/OTS_20100823_OTS0058/wgkk-erfolgreich-im-kampf-gegen-schwarzarbeit-und-sozialbetrug> accessed 30 November 2010.

¹⁶⁶ Federal Law Gazette No. 414/1972 as amended by Federal Law Gazette I No.59/2010.

¹⁶⁷ <http://www.buak.at/servlet/ContentServer?pagename=BUAK/Page/Index&n=BUAK_71> accessed 1 December 2010.

¹⁶⁸ W. Schramml, *Arbeitsrecht 2* (Braumüller, Vienna 2008) XXVIII 3 A.

¹⁶⁹ Cf. Act on Construction Workers' Annual Leave and Severance Pay, s. 23(a).

¹⁷⁰ This data encompasses data on the employer, the business and name, date of birth and employment period of the worker.

¹⁷¹ Cf. Act on Construction Workers' Annual Leave and Severance Pay s. 31.

2.2 Cooperation between actors within the country

2.2.1 Legal framework for cooperation

Cooperation between actors

The *Control Unit for Illegal Employment*¹⁷² benefits from the general duty of other public authorities and institutions such as the Health Insurance Funds to support the Control Unit in all its functions in respect of the AEL. At the same time, AEL s. 27 (5) explicitly states that authorities have to inform the control unit in cases where there is reasonable suspicion that the AEL has not been applied. Importantly, the police has to support the Control Unit upon request in conducting inspections.¹⁷³ However, the support is mutual since the Control Unit is also obliged to notify other relevant authorities when monitoring any infringements of labour regulations or environmental regulations.¹⁷⁴ The Control Unit is – based on different legal acts – under different obligations to file a complaint. For example, with regard to criminal offences in respect of social fraud, such as fraudulent withholding of social security duties¹⁷⁵, the Control Unit falls under the general duty of all authorities to file a complaint at the police or public prosecutor^{176 177}.

The *Labour Inspectorate*, similar to the Control Unit for Illegal Employment, benefits from a general duty to be supported by other public authorities.¹⁷⁸ In order to be able to fulfil its obligations, the Labour Inspectorate is allowed to make use of the data of the Control Unit for Illegal Employment. The data which are allowed to be used are predefined by law and encompass data about the employer such as names, dates of birth, addresses, and places of employment and time periods of employment.¹⁷⁹ Additionally, the health insurance fund also has to support the inspection and provide data, which are stored. With this provision, it is possible for the inspector to find out who the employer is; in some cases, the inspector is only aware of the names of employees.¹⁸⁰ When bigger construction sites are inspected in particular, it is

¹⁷² Regarding the cooperation the focus is laid on the obligations of the Control Unit based on the AEL and does not discuss in detail the obligations based on the Act on income tax or the Gambling Act.

¹⁷³ Cf. AEL s. 27(3).

¹⁷⁴ Cf. AEL s. 27(2).

¹⁷⁵ Cf. CC s. 153(d).

¹⁷⁶ CCP s. 78.

¹⁷⁷ Cf. W. Lehner, 'Anzeigerechte und Anzeigepflichten der KIAB' (2009) taxlex, p. 242.

¹⁷⁸ Cf. Act on Labour Inspection s. 20(1).

¹⁷⁹ Cf. Act on Labour Inspection s. 20(7).

¹⁸⁰ Cf. Act on Labour Inspection s. 21(1)(a). G. Ercher, 'Bundesgesetz, mit dem das Arbeitsinspektionsgesetz 1993, das Arbeitsvertragsrechts-Anpassungsgesetz, das Allge-

not easy for the labour inspectorate to identify the employer of the workers, since several companies work together. According to the Act on Labour Inspection s. 21 (1a), the health insurance fund has to provide the labour inspection with this data, which is absolutely necessary for the actual inspection the inspector does.¹⁸¹ Again similar to the Control Unit for Illegal Employment, the Labour Inspectorate is supported by the police in order to be able to conduct inspections.¹⁸²

The basis of cooperation between *police* and *public prosecutor* lies within the regulation of the investigation procedure based on the Code on Criminal Procedure.¹⁸³ After filing a complaint, the formal investigation procedure starts. The investigation procedure in criminal cases is driven by the basic principle that public prosecution and police jointly conduct the investigation. The joint investigation balances the investigative competences of the police with the competence of the public prosecution to bring an indictment.¹⁸⁴ At the same time, the public prosecutor leads the investigation. Public prosecutors give orders to the police and the police must keep them informed. In the end, public prosecutors decide whether the investigation ends, or an indictment is brought.¹⁸⁵ Experiences in actual cooperation between police and public prosecutors in cases on THB vary. In practice, there is variation among individual public prosecutors on how much evidence has, for example, to be gathered by the police. Some public prosecutors may require more evidence than others in order to follow up the investigation. According to one case, there is room for improvement regarding the cooperation. With regard to another case, police and public prosecutors both stated that cooperation was very good. However, a lot of time was invested in this particular case, and unusually high staff costs were borne. In general, the police must act proactively in cases of THB in order for the on-going investigation headed by the public prosecutor to be successful.¹⁸⁶

meine Sozialversicherungsgesetz und das Bundesgesetz über Verkehrs-Arbeitsinspektion geändert werden, BGBl I 2009/150⁷ (2010) AsoK, p. 71.

¹⁸¹ Amendment to the Act on Labour Inspection, introductory and commentary to the amendments

<http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_00490/fnameorig_172256.htm> accessed 7 February 2011.

¹⁸² Cf. Act on Labour Inspection s. 20(6).

¹⁸³ Federal Law Gazette No. 631/1975 as amended by Federal Law Gazette I No. 64/2010.

¹⁸⁴ M. Vogl, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code (Code on Criminal Procedure)* (2nd edn, Manz, Vienna 2006) CCP s. 98, p. 2.

¹⁸⁵ M. Vogl, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code (Code on Criminal Procedure)* (2nd edn, Manz, Vienna 2006) CCP s. 101, pp. 5-9.

¹⁸⁶ Cf. Interview with Criminal Intelligence Service (September 2010), interview with Control Unit for Illegal Employment (August 2010), interview with Labour Inspectorate (November 2010) and interview with a public prosecutor (November 2010).

Another aspect of cooperation is that between the police and LEFOE-IBF. After identifying a presumed victim, the usual next step for the police is to bring the woman to LEFOE-IBF. The cooperation between police and LEFOE-IBF is based on s. 25 of the Security Police Act¹⁸⁷, which allows the police to involve NGOs which support victims of violence. Since LEFO-IBF supports women, the police and the Federal Chancellery/Women and Equality jointly assign this NGO.¹⁸⁸ The police underlines its well-functioning cooperation with LEFOE-IBF and points out the necessity of the cooperation for a successful and efficient investigation procedure. In 2008, the police referred 58 women to LEFOE-IBF from all over Austria.¹⁸⁹

Investigation techniques

The investigation techniques used by the police can be divided into three groups regarding their preconditions. There are measures which can be enacted by the police independently. Additionally, there are measures that can only be enacted when so ordered by the public prosecutor. The third group consists of measures which have to be enacted by the public prosecutor after being authorised by the court.¹⁹⁰

The enquiry (*Erkundigung*)¹⁹¹ and questioning (*Vernehmung*)¹⁹² are usually the first techniques which are applied in cases of THB. Next step can be the observation, but this is decided on a case-to-case basis and depends also on the cooperation with the public prosecutor.¹⁹³

In general, observation (*Observation*)¹⁹⁴ is permitted if it is necessary to clarify a criminal act or to investigate the whereabouts of the accused. In cases where the observation takes longer than 48 hours, for example, then it is only permitted if *inter alia* the criminal act is sanctioned with more than one year imprisonment.¹⁹⁵ The latter form of observation needs to be ordered by the

¹⁸⁷ Federal Law Gazette 566/1991 as amended by Federal Law Gazette I No. 133/2009.

¹⁸⁸ Additionally, LEFOE-IBF is supported by the Ministry of Justice with regard to psycho-social and legal assistance.

¹⁸⁹ Ministry of Interior and Ministry of Justice, *Report on Security 2008*, p. 351 <http://www.parlament.gv.at/PAKT/VHG/XXIV/III/III_00099/imfname_173662.pdf> accessed 1 December 2010.

¹⁹⁰ H. Houf, W. Lehner, *Handbuch KIAB –Kontrollen* (Manz, Vienna 2008)(128).

¹⁹¹ Cf. CCP s. 152.

¹⁹² Cf. CCP s. 153.

¹⁹³ Interview with regional Criminal Intelligence Service (November 2010).

¹⁹⁴ Cf. CCP s. 130.

¹⁹⁵ Council of Europe, Group of states against corruption, *Joint First and Second Round Evaluation Compliance Report on Austria* (Report) (11 June 2010) para. 44 <http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2%282010%291_Austria_EN.pdf> accessed 18 November 2010.

public prosecutor; otherwise the police can decide to use it independently.¹⁹⁶ In practice, the observation is used in specific cases of THB.¹⁹⁷

A usual undercover investigation (*verdeckte Ermittlung*)¹⁹⁸ may be carried out if it appears to be necessary for clarifying a criminal act. Longer or systematic undercover investigations can be conducted in cases in which for example the crime is sentenced with at least one year of imprisonment. Longer undercover investigations have to be ordered by the public prosecutor.¹⁹⁹ Fictitious purchase (*Scheingeschäft*)²⁰⁰ is allowed if it is necessary for the clarification of a crime or if the seizure of objects or assets that originate or presumably originate from a crime would otherwise be significantly hindered. Both techniques, fictitious purchase and undercover investigation, are rarely or not used at all for cases of THB.²⁰¹

The acoustical and visual observation of person (*optische und akustische Überwachung von Personen*)²⁰² is a form of secret observation; it includes the observation of actions of a person as well as statements which are private. The observation is supported by technical instruments. In general there are five different forms: three cases of acoustical and visual observation and two different forms of visual observation. Every form has different preconditions.²⁰³ Preconditions are strict and therefore relatively difficult to reach; it is therefore – if applicable at all – used very seldom.²⁰⁴ Also *recording of telecommunication* is possible, monitoring of communication (*Überwachung von Nachrichten*) includes the analysis of the content of communication. It encompasses every message or information which is distributed by an official telecommunication provider.²⁰⁵

The purpose of searching of premises and objects as well as personal search (*Durchsuchung von Orten und Gegenständen sowie von Personen*) is to find a person or specific objects. It is only allowed when for example high probability exists

¹⁹⁶ Cf. CCP s. 133.

¹⁹⁷ Interview with a public prosecutor (November 2010) and interview with regional Criminal Intelligence Service (November 2010).

¹⁹⁸ Cf. CCP s. 131.

¹⁹⁹ Cf. CCP s. 133.

²⁰⁰ Cf. CCP s. 132.

²⁰¹ Interview with regional Criminal Intelligence Service (November 2010) and interview with Criminal Intelligence Service (September 2010).

²⁰² Cf. CCP s. 136.

²⁰³ S. Reindl-Krauskopf, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code (Code on Criminal Procedure)* (2nd edn, Manz, Vienna 2006) CCP s. 136(1-2).

²⁰⁴ Interview with regional Criminal Intelligence Service (November 2010).

²⁰⁵ S. Reindl-Krauskopf, A Tipold, I Zerbes in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code (Code on Criminal Procedure)* (2nd edn, Manz, Vienna 2006) CCP s. 134(41-43).

that the searched person will be present before entering premises.²⁰⁶ This measure is used regularly in cases of THB.²⁰⁷

A seizure (*Sicherstellung*)²⁰⁸ has to be ordered by the public prosecutor and is for example necessary in order to ensure a later forfeiture (*Verfall*)²⁰⁹ or confiscation (*Einziehung*)²¹⁰. Mostly computers and other data media are seized. Also for cases of THB these seized assets have been analysed and used as evidence. More important are seizing of mobile phones and other mobile data media.²¹¹

The next step after a seizure is the sequestration (*Beschlagnahme*) as defined in CCP s. 115. The sequestration is inter alia necessary in cases when seized objects are further used as evidence in the on-going procedure. Upon request of the public prosecutor, the court has to decide on it.

These measures are important in order to support a confiscation of profits (*Abschöpfung der Bereicherung*) at a later stage of the proceedings as well as for evidential purposes. It applies to persons who committed an offense and benefitted from it economically or received any benefit for committing an offense. The Austrian system of confiscation is value-based, so the person receives a court order to pay an amount of money equivalent to the illegal profits received.²¹² It seems that confiscation of profits in general and in cases of THB especially could be further enhanced. Enhanced usage of these tools can also support later claims of compensation of trafficked persons.

Police should earlier cooperate with the specialists on confiscation of profits during the investigation in order to ensure the confiscation. Transnational cases in addition lead to the uncertainty which State finally benefits from the confiscation.²¹³ The Ministry of Justice issued a decree for judges and public prosecutors about practical problems involved in using these tools as well as

²⁰⁶ A. Tipold, I Zerbes, in Frank Höpfel and Eckart Ratz (eds), *Commentary of the Criminal Code (Code on Criminal Procedure)* (2nd edn, Manz, Vienna 2006) CCP s. 119(17).

²⁰⁷ Interview with regional Criminal Intelligence Service (November 2010).

²⁰⁸ Cf. CCP s. 110.

²⁰⁹ Cf. CC s. 20b.

²¹⁰ Cf. CC s. 26. It encompasses the confiscation of objects which have been used or have been intended to be used to commit an offense or have been produced by this offense, if this is necessary to counteract the commitment of offenses.

²¹¹ Ministry of Interior and Ministry of Justice, *Report on Security 2008*, pp. 436–437 <http://www.parlament.gv.at/PAKT/VHG/XXIV/III/III_00099/imfname_173662.pdf> accessed 1 December 2010.

²¹² FATF/OECD, 'Austria, Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism' (2009)(2006) <<http://www.fatf-gafi.org/dataoecd/22/50/44146250.pdf>> accessed 3 December 2010.

²¹³ Cf. Interview with Criminal Intelligence Service (September 2010).

possibilities to improve the application. The utilisation of these tools should be increased.²¹⁴

Another investigation technique used in cases of THB is the request for information on bank data (*Auskunft über Bankkonten und Bankgeschäfte*).²¹⁵

But as stated above, this can only be done upon order of the public prosecutor.

Next to the police, also the *Control Unit for Illegal Employment* has competences to act as police in cases the unit investigates in cases of social insurance fraud. Therefore the unit acts during the investigation in cooperation with the public prosecutor. The unit may apply in these cases all investigation techniques, which are accessible for the police also. As described in the Code on Criminal Procedure, the unit acts either independently, or upon request by the public prosecutor, or requested by the public prosecutor after being authorised by the court.²¹⁶

2.2.2 Application of the legal framework in practice

Cooperation between actors

As shown above the responsibilities of each actor are clearly defined and also the framework for cooperation is elaborated in forms of duties to notify each other or the duty to file a complaint. As shown by interviews, a certain level of cooperation between the actors mentioned above exists. But the intensity of cooperation varies significantly and especially concerning cases of THB, it is not clear how actors are supposed to proceed.

Usually, inspections which are conducted jointly are rather rare or do not happen at all in practice. Due to limited time and staff resources joint inspections of the Control Unit for Illegal Employment and the Labour Inspectorate do not happen. The Control Unit and the Labour Inspectorate notify each other, when situations are monitored during inspections which fall under the responsibility of the other. Although this notification happens, there is no exchange of the follow up. In particular cases only, phone calls are made in order to be informed on the follow-up cases. At the same time, the general cooperation between the Control Unit and the Labour Inspectorate is very good and is supported by exchange meetings, which take place only once in two to three years. However, with regard to specific cases there are only sporadic contacts.

The Control Unit for Illegal Employment and the Labour Inspection can be supported by the police in inspections. Some years ago, the police as well as

²¹⁴ Council of Europe, Group of states against corruption, *Joint First and Second Round Evaluation Compliance Report on Austria* (Report) (11 June 2010) , para. 58 <http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2%282010%291_Austria_EN.pdf> accessed 18 November 2010.

²¹⁵ Cf. CCP s. 116.

²¹⁶ H. Houf, W. Lehner, *Handbuch KIAB –Kontrollen* (Manz, Vienna 2008)(126-128).

the aliens' police usually accompanied the Control Unit. Now, inspections are rather not done in cooperation with the police. Experience of the Control Unit shows that inspections can be done in a smoother way when police is not involved. There are some reasons for that, for example the officers of the Control Unit do not wear a uniform or police officers attract more attention. Only in exceptional cases police supports the inspections. On the other hand, the Control Unit possesses a rather broad competence to enter premises. This is also used by other actors or authorities, such as the police, which then may profit from entering premises. Also Labour Inspectorate conducts inspections rather without the support of the police since the main responsibility of the Labour Inspectorate is to ensure the safety of the workplace and the inspection does not deal with the status of the worker (e.g. residence status) or with employees him- or herself.

With regard to situations in which exploitation might occur, it is, on the one hand, often not clear what indicators of THB might exist. On the other hand, it is not clear, under which circumstances the police should be contacted, although there is awareness raising.²¹⁷ Consequently, two obstacles pave the cooperation between the Control Unit and the police in matters of THB for labour exploitation. First of all, it is not clear which situations might amount to exploitation since indicators on THB for labour exploitation are not defined and trained. Secondly, it is unclear, whom to contact within the police when the unit suspects exploitative situations.

Differently is the cooperation between LEFOE-IBF and the police. The cooperation in cases of THB for sexual exploitation is based on practice of several years. THB for labour exploitation is only in so far covered, as women are victims. The support of two different ministries is laid down in a contract for five years, which includes also regulations on the cooperation. One legal basis for the cooperation between LEFOE-IBF and police can be found in SPA s. 56, which allows the transfer of personal data. The transfer is allowed for the police, as long as it is necessary for the protection of the individual at risk. Additionally, the instrument of legal and psycho-social assistance throughout criminal proceedings, which is also organised by LEFOE-IBF for victims of THB, is financed by another ministry (Ministry of Justice).

Investigation techniques

As indicated above, the application of investigation techniques depends in some cases on an order of the public prosecutor or a decision of the court. Since the investigation procedure should be conducted jointly between public prosecutor and police, under the supervision of the public prosecutor though, individual cooperation influences the work. It might be influenced by the

²¹⁷ Interview with Labour Inspectorate (November 2010), interview with Control Unit for Illegal Employment (August 2010) and interview with Ministry of Finance (August 2010).

personal relation between public prosecutor and police in a specific case. In some investigations, it seems to work very well; in others cooperation was rather low. Although various techniques can lead to numerous evidences, the evidences are difficult to gather. Interviews showed that consequently the statement of the victim still plays a crucial rule throughout the investigation and proceedings.²¹⁸

One specific case concerning THB and begging as form of exploitation is an example for excellent cooperation between police and public prosecution and usage of investigation techniques. Within the case around 50 to 80 Romanian begging persons have been identified, who faced exploitation in Vienna. For example, the rent for a bed has been excessive. The indictment included 18 accused and around 60 victims. The Austrian police got in contact with the Romanian public prosecution and the whole case was further investigated by Romanian authorities. Finally, five arrest warrants have been issued. Police invested an exceptional amount of time and human resources and made use of all possible investigation techniques. It would probably not be possible to invest as much time and resources in every similar case.²¹⁹

2.3 Cooperation between States

2.3.1 Legal framework for cooperation in trans-national Trafficking in Human Beings-cases

Implementation of the EU legal framework

The basis of international cooperation in cases of THB is mainly regulated by the Extradition and Mutual Legal Assistance Act.²²⁰ The act is applicable when no other inter-state treaty exists.²²¹ The act is based on the principle of reciprocity. Consequently a request of another State can only be supported when this State would also support Austria's requests. In case of uncertainty about the reciprocity, the Ministry of Justice has to be consulted.²²² The act regulates extradition²²³, transit of persons through Austria for the purpose of law enforcement²²⁴, legal assistance²²⁵, transfer of proceedings including the

²¹⁸ Cf. Interview with Control Unit for Illegal Employment (August 2010), interview with a public prosecutor (November 2010) and interview with Criminal Intelligence Service (September 2010).

²¹⁹ Cf. Interview with a public prosecutor (November 2010) and interview with Criminal Intelligence Service (September 2010).

²²⁰ Federal Law Gazette No. 529/1979 as amended by Federal Law Gazette I No. 112/2007.

²²¹ Cf. Extradition and Mutual Legal Assistance Act s. 1.

²²² Cf. Extradition and Mutual Legal Assistance Act s. 3.

²²³ Cf. Extradition and Mutual Legal Assistance Act s. 10-41.

²²⁴ Cf. Extradition and Mutual Legal Assistance Act s. 42-49.

²²⁵ Cf. Extradition and Mutual Legal Assistance Act s. 50-59(a).

transfer of monitoring of persons who received convictions on probation²²⁶ and transfer of enforcement of foreign convictions.²²⁷

Legal assistance allows inter alia for the following measures: production, search and seizure of information, documents, or evidence from financial institutions, or other natural or legal persons; taking evidence or statements from persons or sending of relevant documents and records.²²⁸

The Ministry of Justice is the central authority for mutual legal assistance or extradition and forwards requests to the respective authority. All incoming requests are registered in a database which is accessible for the public prosecution and all courts.²²⁹

Regarding police cooperation, the Police Cooperation Act (*Polizeikooperationsgesetz, PolKG*)²³⁰ and the Police Cooperation Act on cooperation within the EU (*EU-Polizeikooperationsgesetz, EU-PolKG*)²³¹ are of high importance. The international police cooperation encompasses international assistance in police matters and measures of law enforcement authorities abroad as well as foreign law enforcement authorities in Austria, especially for observation.²³² Law enforcement is obliged to render assistance upon request in case of reciprocity. Even in the case that there is no formal request issued yet, law enforcement is obliged to act.²³³ The transfer of personal data to Austrian law enforcement authorities is possible under certain circumstances. At the same time the transfer of personal data to Europol, Interpol or any foreign law enforcement authority is only allowed under certain conditions. These data are not allowed to be used for any other purpose as agreed without the consent of the Austrian authority and, inter alia, the data have to be erased immediately when not needed anymore.²³⁴

The Police Cooperation Act on cooperation within the EU regulates the cooperation with other law enforcement authorities within the EU and with Europol. Since recently, it is clearly stated, that also the financial authorities

²²⁶ Cf. Extradition and Mutual Legal Assistance Act s. 60.

²²⁷ Cf. Extradition and Mutual Legal Assistance Act s. 64.

²²⁸ FATF/OECD, *Austria, Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism* (2009)(1127) <<http://www.fatf-gafi.org/dataoecd/22/50/44146250.pdf>> accessed 3 December 2010.

²²⁹ FATF/OECD, *Austria, Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism* (2009)(1120-1130) < <http://www.fatf-gafi.org/dataoecd/22/50/44146250.pdf>> accessed 3 December 2010.

²³⁰ Federal Law Gazette I No. 104/1997 as amended by Federal Law Gazette I No. 132/2009.

²³¹ Federal Law Gazette I No. 132/2009.

²³² Cf. PolKG s. 1(2).

²³³ Cf. PolKG s. 3 (1), (2).

²³⁴ Cf. PolKG s. 8.

can cooperate with Europol.²³⁵ Additionally, it regulates trans-border cooperation, the usage of the Visa Information System (VIS) and Schengen Information System (SIS).

The Federal law on judicial cooperation in criminal matters with the Member States of the European Union (*Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union, EU-JZG*)²³⁶ implements the European Arrest Warrant in the Austrian legislation. The offence has to be punishable by imprisonment or a detention order for a maximum period of at least one year. In addition, the double criminality rule applies, which means that the offence has to be punishable in the requesting State as well as in the executing State. Regarding specific offences including THB this rule does not apply. The Austrian law copied the respective exemptions of the Framework Decision on the European Arrest Warrant verbally in its Annex I.²³⁷

The same law regulates building Joint Investigation Teams (JITs). In case, investigations in Austria, which have to be supported by police organs of other EU Member States, are needed, the Austrian public prosecutor has to contact the relevant counterpart in other EU Member States directly. The Austrian public prosecutor suggests building a JIT and has to inform the Austrian police as well as the head of public prosecution. If another EU Member State requests a JIT, the Austrian public prosecutor decides upon Austria's participation.²³⁸

In the field of police cooperation, several bilateral agreements have been concluded; inter alia with Albania (entry into force 1 January 2008) or Bosnia and Herzegovina (entry into force 1 September 2007).²³⁹ Negotiations on agreements regarding police cooperation have been initiated or continued with inter alia Malta, Ukraine, Georgia, Tunisia and Mexico.²⁴⁰

The well working net of liaison officers of the Ministry of Interior supports the daily transnational work. The ministry currently employs 23 attachés in

²³⁵ Cf. Explanatory Notes 875 d.B. XXIV. GP 8 (government bill regarding the Act on Anti-Fraud 2010).

²³⁶ Federal Law Gazette I No. 36/2004 as amended by Federal Law Gazette I No. 112/2007.

²³⁷ L. Sautner, 'Die Vollstreckung eines Europäischen Haftbefehls nach dem EU-JZG' (2005) ÖJZ 2005/20.

²³⁸ Federal law on judicial cooperation in criminal matters with the Member States of the European Union s. 61.

²³⁹ European Migration Network, NCP Austria, *Annual Policy Report 2009* (Vienna 2010) 31 <<http://www.emn.at/emn-reports.html>> accessed 30 November 2010.

²⁴⁰ Ministry of Interior and Ministry of Justice, Report on Security 2008, p. 320 <http://www.parlament.gv.at/PAKT/VHG/XXIV/III/III_00099/imfname_173662.pdf> accessed 1 December 2010

countries such as Bulgaria, Albania, Georgia, Italy, Greece, Jordan and – as of 2011 – also in South-East Asia.²⁴¹

Trans-national cooperation in THB-cases

International cooperation with regard to THB is also part of the Austrian National Action Plan. The plan envisages under chapter VIII, on the one hand, the intensification of cooperation within international bodies and, on the other hand, the improvement of cooperation with Eastern Europe partners in the fields of criminal prosecution. According to the plan, projects should be implemented which focus on training activities for and coordination of actions aimed at officials in the fields of law enforcement and criminal prosecution. Inter alia the Ministry of Interior aims at promoting further activities to enhance police cooperation at the EU and international levels.²⁴²

Austria is coordinating a COSPOL (Comprehensive Operational Strategic Planning for the Police) project to combat THB. This project is mainly focusing on Romania, in particular on trafficking in children and women for the purpose of sexual exploitation. Aim of the project is to identify and prosecute especially Romanian criminal organisations which are active in the EU. Starting in 2006, the project firstly collected relevant data in 2007. All participating countries were asked to collect the same data. The findings of this first step have been further evaluated by Europol. Reforms and staff changes in the relevant authority in Romania caused some delays, nevertheless the operational investigation started in 2008.²⁴³

Due to Austria's geographical position, Austria puts a strong focus in police cooperation with countries of the Western Balkans. Austria intends to continue specific projects which support countries in this region in the field of criminal police. COSPOL projects against THB should be continued, also projects against smuggling and on border management.²⁴⁴

Within the framework of smuggling and illegal migration, police reports also on cooperation with EUBAM (European Union Border Assistance Mission) in cases on THB. Adolescents between 14 and 18 years from Moldova are

²⁴¹ M. Sebanz, 'Säulen der Verbrechensbekämpfung' (Pillars of Combating Crime) *Öffentliche Sicherheit* (Vienna, 9-10/10).

²⁴² Cf. National Action Plan against Human Trafficking, VIII.7 and VIII.8 <http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/2-Aussenpolitik_Zentrale/Menschenrechte/TFM_Aktionsplan_engl_V20091007_LAYOUT_FINAL.pdf> accessed 30 November 2010.

²⁴³ Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) pp. 23-24.

²⁴⁴ European Migration Network, NCP Austria, *Annual Policy Report 2009* (Vienna 2010) p. 35 <<http://www.emn.at/emn-reports.html>> accessed 30 November 2010.

trafficked to Austria in order to commit burglaries. Investigations started in cooperation with Slovakia, Italy and EUBAM.²⁴⁵

2.3.2 Application of legal framework in practice

Generally, police cooperation in cases of THB can be described as rather well working. Within Austria, regional police turns to the Criminal Intelligence Service, which has the relevant contacts to police departments abroad. Cooperation works very well with specific countries, such as Bulgaria or Romania. Ideal police cooperation requires one single point of contact. Sometimes specific units or departments are labelled as single points of contact for THB matters, but do not have all necessary competences or would not have a good overview of the whole country and the respective regional authorities. Additionally, a common spoken language helps enormously and facilitates communication. Legal barriers, such as significant differences in the legislation, are less within the EU.²⁴⁶

During a case on THB for the purpose of exploitation through begging, Romania took over the investigations from Austria and continued the investigation procedure in Romania. The Austrian police initiated the contact with the Romanian public prosecutor. Within this case, a rather organisational obstacle in trans-border cooperation came up, the language barrier. Informally it was agreed which parts of the investigation records need to be translated, usually the full records have to be translated. But this would have taken a very long time, probably up to a year, and meant high translation costs.²⁴⁷ This language barrier is also mentioned within mutual administrative assistance within the Posting of Workers Directive.²⁴⁸ Translation costs are usually high, consequently translations are reluctantly done.²⁴⁹

Austria had cases on THB which were investigated within a JIT, but JITs are used for more complex cases. However, Austrian experiences with JITs are also gained in the area of smuggling. This is also seen as valuable information for THB, since trends can be detected and some cases of smuggling can turn into THB cases later. In the experience of the police JITs have several advantages. One major advantage is that information can be exchanged much faster and easier. Secondly, JITs offer also some financial support, consequently necessary travels or funding for common operational measures can be secured.

²⁴⁵ Cf. Ministry of Interior, *Annual Report on Illegal Migration* (2008) p. 39 <http://www.bmi.gv.at/cms/BK/publikationen/files/JAHRESBERICHT_2008_Final_Version.pdf> accessed 1 December 2010.

²⁴⁶ Cf. Interview with Criminal Intelligence Service (September 2010).

²⁴⁷ Cf. Interview with a public prosecutor (November 2010).

²⁴⁸ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

²⁴⁹ Cf. Interview with Ministry of Finance (August 2010).

It is usually not difficult to get the permission to build up a JIT; it depends on the public prosecutor, who decides.²⁵⁰

The benefits of the network of liaison officers of the Ministry of Interior are emphasised. The network supports in providing the requested information and is less bureaucratic. The liaison officers are able to receive information faster and have the right contacts to the local police and judiciary. The formal procedure using Interpol or Europol would sometimes cost too much time.²⁵¹

2.4 Summary of findings

2.4.1 Identified obstacles

Actors who are involved in identifying and investigating cases of THB for labour inspection may differ from those authorities, which are usually involved in THB for sexual exploitation. The main, different actor is the Control Unit for Illegal Employment, which is allowed to enter business premises and further rooms – also private homes – in which employees might work. Further authorities, which are also allowed to enter work sites and business premises, are the Labour Inspectorate, the District Health Insurance Fund and the Construction Workers' Annual Leave and Severance Pay Fund. These authorities have specific tasks, such as protecting the security at the work place, but THB is not in their scope of responsibility.

Authorities, which are usually involved in investigating THB, are mainly the police, public prosecution, judges and the Control Unit for Illegal Employment. All these authorities conduct trainings in THB in general. But according to the information received, the trainings are usually not focused on THB for labour exploitation. The authorities do not offer specific courses or trainings on THB for labour exploitation. The trainings for the Control Unit for Illegal Employment deal with THB for labour exploitation and for sexual exploitation. Within the judiciary, the demand for trainings on THB is rather low due to demanding workloads and the low level of importance of THB cases in the daily work of judges or public prosecutors.

As already discussed above, the term exploitation is seen as rather vague by the involved authorities, although case law exists regarding this term. Nevertheless, specific questions are left open, such as the question regarding the excessiveness of working hours. How excessive have the working hours to be in order to amount to exploitation? As shown by interviews, it is unclear in which cases *exploitation* could be involved. Specific indicators or reference points on THB for labour exploitation do not exist, but would be supportive and would help in an assessment.

²⁵⁰ Cf. Interview with Criminal Intelligence Service (September 2010).

²⁵¹ Interview with regional Criminal Intelligence Service (November 2010).

After identifying presumed cases of THB, it is shown by interviews, that it is rather unclear how to cooperate in cases of THB for labour exploitation. As indicated in the chapters 2.2.1 and 2.2.2, cooperation between the authorities is regularised, but on a general basis. It is often unclear to the actors, how the case proceeds. The *Control Unit for Illegal Employment* for example does not receive information on further investigations after having filed a complaint at the public prosecutor. Exchange with the public prosecution on the reasons for closing the investigation for example would be helpful for the control unit.²⁵² At the same time, when forwarding relevant documents or information on inspections by the Control Unit for Illegal Employment to other authorities, it would be useful to have an exchange on the follow-up.²⁵³

Apart from the general legally defined cooperation, cooperation between the various authorities with regard to THB for labour exploitation is not determined specifically. Cooperation in cases of THB for sexual exploitation is practised since several years and the authorities and NGOs involved are clear. Sharing tasks is, on the one hand, practised and, on the other hand, defined in the basic contract of the relevant ministries with LEFOE-IBF and the contract on the psycho-social and legal assistance between the Ministry of Justice and LEFOE-IBF. With regard to cases falling outside the scope of LEFOE-IBF's tasks, practice exists to a lesser extent with regard to THB for labour exploitation. There is no formalised cooperation between the relevant authorities and institutions regarding THB for labour exploitation. Cooperation with regard to THB for labour exploitation seems in general to be rather low and not elaborated enough.

There is the impression that the statement of a victim is still the most important evidence in cases of trafficking in human beings. The victim acting as witness is essential for the criminal proceedings. This is also shown in the case on exploitative labour conditions in agriculture. The victims did not appear at the court, therefore their testimonial was missing. The alleged perpetrators have been acquitted later on due to a lack of evidence.²⁵⁴ Additionally the victim's testimonial is essential, since gathering other evidences by using various investigation techniques is very time consuming. As shown in one case concerning THB and begging as form of exploitation, police gathered a lot of evidences, but had to designate a lot of time and staff to this case. This case had been transferred to Romania successfully later on. The vagueness of the term 'exploitation' leads to the fact, that State prosecutors require different standards of evidences in order to proof 'exploitation'.

Linked to this case, one obstacle in trans-national cooperation was discussed, the language barrier in trans-national cases. The Romanian public prosecution took over a case from the Austrian police and further investigated.

²⁵² Cf. Interview with Ministry of Finance (August 2010).

²⁵³ Cf. Interview with Control Unit for Illegal Employment (August 2010).

²⁵⁴ Cf. Case study 2.

For this transfer it was agreed which parts of the investigation records need to be translated, usually the full records have to be translated. The translation of only parts of the records cost a lot of money. Also within another context it is mentioned that translation costs of documents are rather high and therefore are reluctantly allowed.

Another obstacle in trans-nation cooperation, especially for the investigation, is the necessity of single points of contacts in other countries for cases on THB in general. These contact points need to have sufficient operational competences, in order to ensure also cooperation with police units at provincial level.

The formal cooperation via Interpol and Europol is described as working on a good basis. It is also described, that information gathering is sometimes too slow via Europol or Interpol and other ways are used in order to get information faster.

Using JITs is seen as very conducive in the investigation of trans-national cases. Although it would be in general not very difficult to build up a JIT, the establishment has to be assessed in every relevant case. At the end, not the police, but the public prosecutor decides on the establishment.

2.4.2 Good practices

In order to ensure sufficient awareness regarding THB in general, every police officer receives information on THB in the basic training programme. THB forms part of all further relevant trainings of the Federal Security Academy and of the training of further levels of staff.²⁵⁵ Additionally trainings at police stations at provincial level are organised. Also, several trainings of public prosecution and judges conducted by the Ministry of Justice are mentioned with regard to THB.²⁵⁶

The introduction of trainings on THB for the Control Unit for Illegal Employment is highly appreciated by the staff of the control unit and has a positive impact on the work of the unit. The trainings are conducted in cooperation with the police or LEFOE-IBF. Therefore, the training offers the opportunity to get to know the relevant actors with regard to THB and sustainable cooperation can be established. The importance of these trainings, which have been introduced in 2006, is stressed by several authorities in the interviews. Since receiving the training on THB, this topic would be part of the scope of daily work of the staff.

The net of liaison officers of the Ministry of Interior offers the possibility to get information and support in a less bureaucratic way and usually faster.

²⁵⁵ Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 9-10.

²⁵⁶ Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 18.

Part III

Victim protection and assistance

3.1 Identification of victims

Identification of victims of THB in general

Usually, police would identify victims of THB and refer them either to the NGO LEFOE-IBF or – in the case of children – to the crisis centre ‘Drehscheibe’ administered by the Viennese Youth Welfare authority. The police contacts LEFOE-IBF in the case of presumed victims of THB; the NGO can be reached 24/7 by the police. Police start the investigation and LEFOE-IBF or the ‘Drehscheibe’ continue with the victims’ assistance, which includes *inter alia* housing.

As already indicated above²⁵⁷, the cooperation between police and LEFOE-IBF is considered successful. However, in addition to referring victims from the police to this NGO, victims are also identified by the NGO itself. Victims contact the NGO via friends or a social community. Regarding exploitation in domestic work, church is considered to be a very important factor for a possible identification. Some trafficked women exploited in domestic work are only allowed to leave the house on their own for the service on Sunday. The church then informs the NGO.²⁵⁸ In 2009, 33% of all supported women at LEFOE-IBF had contacted the NGO via friends, other NGOs or organisations engaged in migration. 68% of the women who have lived in the shelter have been referred to LEFOE-IBF by the police. Only 2% of these women managed to contact the NGO on their own. Victims rarely find out about counselling centres, since they are usually controlled and often speak only very little or no German at all.²⁵⁹

The cooperation between LEFOE-IBF and the law enforcement authorities is based on a contract; for several years, the Ministry of Interior has been planning to prepare a nationwide internal decree which would envisage that LEFOE-IBF be responsible for all female victims of human trafficking identified in Austria.²⁶⁰ This further step towards a more formalised way of cooperation takes time. However, in the meantime other NGOs in Austria have begun to take care of trafficked persons, such as the organisation EXIT in Vienna. EXIT offers counselling though its work is mainly focussed on

²⁵⁷ See chapter 2.2.1.

²⁵⁸ Cf. Interview with NGO (August 2010).

²⁵⁹ Cf. LEFOE-IBF, *2009 Annual Report* (Vienna 2010) p. 15.

²⁶⁰ Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 14.

women being trafficked from Nigeria to Austria for the purpose of sexual exploitation.²⁶¹

Although numerous trainings are conducted for law enforcement,²⁶² it is assumed that a large number of victims remain unidentified. The reasons why many remain unidentified are manifold. The above described situation of identification and usual way of referral is limited to the identification of women who are in most cases sexually exploited and – in fewer cases – of children. Other forms of THB or cases involving male victims of THB involve bigger obstacles in respect of THB identification.

Only recently, the Federal Criminal Intelligence Service installed a hotline for THB and smuggling.²⁶³ The general public can inform the police about situations which might be linked to THB or smuggling per email or on the phone, and anonymously if wanted. The hotline should support the identification and encourage the general public to report. The hotline does not have a clear focus on THB for the purpose of labour exploitation. According to its description, the hotline seeks information from clients of the sex industry.²⁶⁴

Identification of child victims of THB

The identification of child victims of THB is described as rather difficult, since it seems to be very challenging to distinguish between unaccompanied children seeking asylum, trafficked children or children who were smuggled. Additionally, children are usually identified while committing a crime such as pick pocketing; therefore the police has to investigate more deeply in order to come to the conclusion that the child might be presumed trafficked.²⁶⁵ The problems around identification are, however, paired with a lack of awareness, especially within the youth welfare authorities in other provinces of Austria. Other provinces' authorities are rarely, if at all, aware of any cases of THB involving children.²⁶⁶ This leads to the conclusion that most children affected by THB are not identified in Austria.

²⁶¹ Cf. <<http://www.adesuwainitiatives.org>> accessed 13 December 2010. Additionally CARITAS supports within the project 'Talitha' victims of THB in the province of Carinthia, cf. <<http://www.caritas-kaernten.at/index.php>> accessed 13 December 2010.

²⁶² Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 3 and chapter 2.1 above.

²⁶³ Cf. <<http://www.bmi.gv.at/cms/BK/meldestellen/menschenhandel/start.aspx>> accessed 14 December 2010.

²⁶⁴ Cf. Federal Ministry of Interior <http://www.bmi.gv.at/cms/BK/presse/files/181020_Kampf_gegen_Menschenhandel_Meldestelle_und_Hotline_im_Bundeskriminalamt.pdf> accessed 14 December 2010.

²⁶⁵ Cf. Austrian Task Force on Combating Human Trafficking, *Report on the Working Group on Child Trafficking* (2008) p. 11.

²⁶⁶ Cf. Austrian Task Force on Combating Human Trafficking, *Report on the Working Group on Child Trafficking* (2008) pp. 10-11.

It is therefore suggested that a process on identification is developed which involves several stakeholders, including the youth welfare institutions. At the moment, police identifies most of the children.²⁶⁷ Additionally, child trafficking is a nationwide problem in Austria, but institutionalised referral only exists in Vienna. A nationwide problem needs nationwide care and support.²⁶⁸ At the moment, such a National Referral Mechanism focussed on child trafficking does not exist in Austria, though the Austrian Task Force is working on it since the issue is included in the National Action Plan.²⁶⁹ Currently, other provinces' youth welfare institutions are not able to provide child victims of THB with specialised institutions, therefore children are housed in general youth welfare institutions led by persons who are not specialised in trafficked children either.²⁷⁰ The lack of awareness can be solved by conducting trainings, but a strategy for multi-stakeholder trainings does not exist.²⁷¹ Mostly, multi-stakeholder trainings with regard to child trafficking are conducted by the NGO Ecpat Austria.²⁷²

Age assessments of children are usually conducted by the aliens' police. If the age of a child cannot be clearly determined by documents, the police has to assess the age medically. In case of doubt about the age of the child, the age has to be assumed.²⁷³

If a child is identified as a presumed victim of THB and is unaccompanied, the youth welfare authority has to apply for a transfer of custody. A guardian is appointed who has full custody over the child, including legal representation.²⁷⁴ In Austria, the crisis centre of the Viennese youth welfare authority called 'Drehscheibe' is formally in charge of all children who are identified as victims of THB Vienna. The data of the 'Drehscheibe' do not

²⁶⁷ Cf. Ecpat Austria (ed), *Alternative Report on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (April 2008) p. 30.

²⁶⁸ Cf. Austrian Task Force on Combating Human Trafficking, *Report on the Working Group on Child Trafficking* (2008) p. 6.

²⁶⁹ Cf. National Action Plan against Human Trafficking, IV.8 <http://www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/2-Aussenpolitik_Zentrale/Menschenrechte/TFM_Aktionsplan_engl_V20091007_LAYO_UT_FINAL.pdf> accessed 30 November 2010.

²⁷⁰ Ecpat Austria (ed), *Alternative Report on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (April 2008) p. 30.

²⁷¹ M. Ammer, M. Nowak, *FRA Thematic Study on Child Trafficking Austria* (2008)(42) <<http://fra.europa.eu/fraWebsite/attachments/Child-trafficking-09-country-at.pdf>> accessed 23 November 2010.

²⁷² Cf. <<http://www.ecpat.at/index.php?id=48>> accessed 14 December 2010.

²⁷³ Cf. APA s. 12(4).

²⁷⁴ M. Ammer, M Nowak, *FRA Thematic Study on Child Trafficking, Austria* (2008)(65-66) <<http://fra.europa.eu/fraWebsite/attachments/Child-trafficking-09-country-at.pdf>> accessed 23 November 2010.

give further information on how the children have been referred to the 'Drehscheibe'. The police refers almost all children to this place, and only a small percentage are referred by other institutions or organisations.²⁷⁵ In exceptional cases, LEFOE-IBF takes care of girls under the age of 18.

Identification of victims of THB for the purpose of labour exploitation

In order to tackle the issue of THB for the purpose of labour exploitation, the Ministry of Finance made a first, important step and introduced trainings on a regular basis for staff members of the *Control Unit for Illegal Employment* regarding THB in 2006. The trainings offered have a great impact regarding awareness raising. However, the trainings discuss mainly the topic of THB for the purpose of sexual exploitation, since these are the most important cases in the daily work of the unit. They seem to be rather short and information on how to handle cases of THB is missing.²⁷⁶

Female victims of THB for the purpose of labour exploitation have been referred to LEFOE-IBF by the police, and the police is adequately sensitised regarding this form of THB. The police might be informed by private persons or by a hospital. In cases of domestic workers particularly, victims may turn to the embassy which would then inform LEFOE-IBF.²⁷⁷

The system of referral with regard to female victims of THB for sexual exploitation is based on experience of cooperation between LEFOE-IBF and the police. This experience does not exist with, on the one hand, male trafficked persons and, on the other hand, other sectors besides exploitation in domestic work or sexual exploitation. New and further modalities of identification need to be found and consequently new systems of referral need to be identified. Police experience shows that cooperation with male victims seems to be rather difficult.²⁷⁸

The system of identification should not be entirely based on identification by police. Civil society is mentioned as an important actor with regard to women exploited in households. The cashier at the supermarket or the kindergarten teacher can play important roles in identifying.²⁷⁹ The newly installed hotline of the police may be a useful tool in the future in order to get more information from the general public.

²⁷⁵ Ecpat Austria (ed), *Alternative Report on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (April 2008) p. 6.

²⁷⁶ Cf. Interview with Ministry of Finance (August 2010) and interview with Control Unit for Illegal Employment (August 2010).

²⁷⁷ Cf. Interview with NGO (August 2010).

²⁷⁸ Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 14.

²⁷⁹ Cf. Interview with NGO (August 2010).

But in addition to civil society, other public authorities need to be identified which might be supportive with regard to THB for the purpose of labour exploitation.²⁸⁰

The role of the Control Unit for Illegal Employment has already been discussed above. It was mentioned that authorities of the asylum system should also be more involved in combating THB and contribute to more identifications. The integration of NGOs into the work of the first reception centres for asylum seekers is planned in order to identify those asylum seekers who are presumed victims of THB. Additionally, organisations and social institutions should be further sensitised with regard to THB, offering for example information on, or provision of, basic care²⁸¹ for asylum seekers.

Furthermore, the control units of the District Health Insurance Funds are mentioned as possible further actors.²⁸² The District Health Insurance Fund has a different view though, and it mentioned that although on-site inspections are conducted, THB is definitely not in their scope of responsibility. For this actor, it is of primary concern whether an employer established working relations with employees and did not register the employees for social security issues at the same time. THB-issues would be out of its scope. Furthermore, it was explained that any action during these inspections with regard to THB would rather be an interference with long-term planned investigations on THB by the police, which would only be jeopardised by the fund.²⁸³

Additionally, the Labour Inspectorate is also allowed to conduct inspections. But, like the District Health Insurance Funds, the Labour Inspectorate also considers THB issues as outside of its scope of work or legal responsibility. In the case of an inspection, from the perspective of the Labour Inspection, it is only relevant whether a certain person actually works at the inspected work site. In the case that the person might be working illegally, the Control Unit for Illegal Employment is responsible. In the case that the employer might not have registered the person with regard to social security payments, the District Health Insurance Fund is responsible. The Labour Inspectorate is basically not interested in the legal status of a person; the main purpose of the inspections is the protection of employees and the avoidance of accidents. Since THB is not within its competences, no specific trainings are offered.²⁸⁴

²⁸⁰ Cf. Interview with NGO (August 2010).

²⁸¹ The basic care for asylum seekers is regulated in the Basic Welfare Support Agreement (*Grundversorgungsvereinbarung*) and comprises for example accommodation, board, money, monthly pocket money or medical examination. Cf. <<http://www.erso-project.eu/partners/national-asylum-return-policy/austria>> accessed 14 December 2010.

²⁸² Cf. Interview with Criminal Intelligence Service (September 2010) and interview with Labour Inspectorate (November 2010).

²⁸³ Cf. Interview with District Health Insurance Fund Vienna (November 2010).

²⁸⁴ Interview with Labour Inspectorate (November 2010).

Although sensitised to THB, the Control Unit for Illegal Employment also faces difficulties in the inspection. The primary ‘target’ of an inspection is first of all the business and the employer, but not the employees. Employees are instructed what to say when asked by any control organ. Employees are usually not able to distinguish between the different control organs that may appear at the work site.²⁸⁵ It could be the unit of police dealing with foreigners, the Labour Inspectorate or, for example, the control unit of the health insurance. Workers, who know that their status of residence or working permit violates Austrian law, will be rather reluctant to talk to Austrian control organs. Additionally, the fear of losing their job might also be an obstacle to getting more information from the employees.²⁸⁶ Third country nationals who are illegally in the country are usually referred to the unit of police dealing with foreigners.²⁸⁷

As described above²⁸⁸ after filing a complaint, the formal investigation under the supervision of the public prosecutor starts. Since the public prosecutor decides whether the investigations are closed or an indictment is made, awareness raising of public prosecution is very important. Police needs to act pro-actively in order to be able to ‘persuade’ public prosecution.²⁸⁹ As shown above²⁹⁰, no specific seminar on THB for labour exploitation was conducted with the judiciary. Cooperation with public prosecutors seems in some cases to be rather challenging. As described in case study 2, the Control Unit for Illegal Employment stated that more intense communication and exchange with the public prosecutor during the formal investigation procedure would have been helpful. However, in this case dealing with exploitation in agriculture, the public prosecutor did not close the investigation and issued an indictment. Later on, the persons were acquitted. Since this was the very first case, every actor seemed to have been overburdened with the new, challenging form of cases.²⁹¹ Austria does not follow an administrative procedure in order to qualify someone as a victim of trafficking in human beings and there are no formal criteria established. At the same time, victims cannot themselves apply for an official status. Before being assigned with the residence permit for special protection, a person is presumed trafficked. LEFOE-IBF’s support is not limited to presumed trafficked women referred by the police; it also offers support to women who were referred by other organisations.

²⁸⁵ Interview with Ministry of Finance (August 2010).

²⁸⁶ Interview with Ministry of Finance (August 2010).

²⁸⁷ Interview with Control Unit for Illegal Employment (August 2010).

²⁸⁸ Cf. M. Heemskerk and C. Rijken, ‘Combating Trafficking in Human Beings for Labour Exploitation in The Netherlands’, Chapter 2, para 2.1 in this book.

²⁸⁹ Cf. Interview with Criminal Intelligence Service (September 2010).

²⁹⁰ Cf. M. Heemskerk and C. Rijken, ‘Combating Trafficking in Human Beings for Labour Exploitation in The Netherlands’, Chapter 2, para 1 in this book.

²⁹¹ Cf. Interview with Control Unit for Illegal Employment (August 2010).

3.2 Legal framework for the protection of the rights of victims of Trafficking in Human Beings for labour exploitation

3.2.1 Assistance to victims

As already described above²⁹², with regard to female victims of THB, LEFOE-IBF plays a central role. In general, LEFOE-IBF offers counselling and housing to trafficked women and girls above the age of 14, and the majority are transferred to them by the police. LEFOE-IBF also gives counselling to women who do not live in an apartment of LEFOE-IBF. Women can live in an apartment together with other clients of LEFOE-IBF. The women are supported 24 hours a day there, the place is safe and the address is kept secret. The apartment offers space for ten women on a long term basis, while there is space for two for use in exceptional cases. In the year 2009, 49 women were living in the apartment, and in total LEFOE-IBF supported 182 women in the same year. Additionally LEFOE-IBF introduced a system of a 'transfer-apartment' which should support the women in their independent reintegration into society. Counsellors come to this apartment three times a week, and women self-organise living in this apartment. This apartment offers space for six.²⁹³

With regard to children, the crisis centre of the Viennese youth welfare authority called 'Drehscheibe' offers housing to trafficked children. As described above,²⁹⁴ the 'Drehscheibe' is only responsible for children identified in Vienna, in other provinces of Austria the general youth welfare authorities take care of children. The majority of the children housed by the 'Drehscheibe' are below the age of 14 and are therefore under the age of criminal responsibility.²⁹⁵ Generally, 'Drehscheibe' needs more funding for its activities.²⁹⁶ The 'Drehscheibe' set up cooperation agreements with youth welfare institutions in Bulgaria and Romania. Staff in specific crisis centres in these two countries is trained by 'Drehscheibe' and should take care of the

²⁹² Cf. G. Cristinel ZAHARIA, 'Combating Trafficking in Human Beings for Labour Exploitation in Romania', Chapter 3, para 1 in this book.

²⁹³ Cf. LEFOE-IBF, *2009 Annual Report* (Vienna 2010) pp. 11-12.

²⁹⁴ Cf. G. Cristinel ZAHARIA, 'Combating Trafficking in Human Beings for Labour Exploitation in Romania', Chapter 3, para 1 in this book.

²⁹⁵ Cf. Ecpat Austria (ed), *Alternative Report on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (April 2008) p. 8.

²⁹⁶ Cf. Ecpat Austria (ed), *Alternative Report on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (April 2008) p. 32.

trafficked children coming back from Austria.²⁹⁷ ‘Drehscheibe’s approach is to return the trafficked children to the country of origin as soon as possible²⁹⁸, consequently it can be assumed that these children do not spend much longer in Austria after being identified as trafficked. This short period of residence in Austria makes it difficult to establish long-term perspectives for trafficked children, which would *inter alia* include access to education or vocational training in Austria.

The Austrian framework on victim assistance does not provide for shelter or counselling services to male victims of THB. Although this issue was already part of the first, and still is part of the second, National Action Plan, no further progress on the topic can be identified. The very low numbers of identified male victims renders the instalment of a counselling centre unnecessary. Interestingly, the Task Force states that there is currently no need to set-up a facility for trafficked males.²⁹⁹

Medical support in the case of emergency is ensured by law in Austria for victims of THB. Until women coming from EU Member States receive the residence permit *for special protection*, they are not protected by health insurance. Until the issue of the residence permit, women only have access to emergency care. LEFOE-IBF can provide the trafficked women with medical support only based on informal contacts and networks of medical doctors who offer treatments for free. By law, the residence permit has to be issued after six weeks.³⁰⁰ This missing access for trafficked persons is acknowledged and is one of the aims of the National Action Plan. However, so far no further progress with regard to this question is evident.³⁰¹ Linked to the residence permit is also the payment of ‘basic care’, which is € 180 per month.³⁰²

3.2.2 Right to residence

According to the Council of Europe Convention on Action against Trafficking in Human Beings, as well as DIR 2004/81/EC,³⁰³ Austria

²⁹⁷ M. Ammer, M. Nowak, FRA Thematic Study on Child Trafficking, Austria (2008)(82) <<http://fra.europa.eu/fraWebsite/attachments/Child-trafficking-09-country-at.pdf>> accessed 23 November 2010.

²⁹⁸ Austrian Task Force on Combating Human Trafficking, *Report by the Working Group on Child Trafficking* (2008) p. 17.

²⁹⁹ Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 14.

³⁰⁰ Cf. SRA s. 69(a)(3).

³⁰¹ Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 15.

³⁰² Cf. LEFOE-IBF, *2009 Annual Report* (Vienna 2010) p. 17.

³⁰³ Council Directive (EC) 2004/81 of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been

implemented a residence permit for trafficked person and has to implement a recovery and reflection period.

The recovery and reflection period implemented by Austria encompasses a minimum of 30 days.³⁰⁴ Within these 30 days, a presumed trafficked person must not be deported. This period is implemented by an internal decree.³⁰⁵ An assessment of the implementation of the DIR 2004/81/EC holds that an implementation by an internal decree does not fulfil the criteria of the directive. The directive is therefore not sufficiently transposed in Austria.³⁰⁶ Additionally, according to jurisprudence of the ECJ, amendments of administrative practices are not sufficient because beneficiaries need to be able to know these rights and to claim these rights before courts.³⁰⁷

The main regulation regarding residence for trafficked persons is SRA s. 69a. This regulation was amended in 2010 and, in comparison to the previous regulation, several improvements have been made. The residence permit *for special protection* offers different groups a permit, including witnesses or victims of THB (CC s. 104a) or of the transnational prostitution trade (CC s. 217)³⁰⁸ as well as unaccompanied minors or minors who are *inter alia* in the custody of the youth welfare authority.³⁰⁹ The residence permit can be issued *ex officio* or upon well-founded application despite the fact that the trafficked person does not fulfil all necessary prerequisites – normally necessary for a residence permit.³¹⁰ For trafficked persons, this permit is issued in order to ensure criminal investigation or to ensure the enforcement of civil law claims linked to THB or the transnational prostitution trade. The permit is not granted when no criminal investigation is conducted or when no civil law claims are issued.³¹¹ The residence permit has to be issued within six weeks. This means that the Ministry of Interior has to decide within six weeks whether the permit is granted or not. Additionally, the permit is granted for at least six months and

the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L 261/19.

³⁰⁴ Cf. Explanatory Notes 1565 d.B. XXII. GP 14 (government bill regarding the Council of Europe Convention on Action against Trafficking in Human Beings).

³⁰⁵ Ministry of Interior, internal decree BMI-FW1700/0090-III/4/05.

³⁰⁶ Cf. Academic Network for Legal Studies on immigration and Asylum in Europe, ‘Directive 2004/81 Victims of Trafficking Synthesis Report’ (2010) p. 31 <http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/odysseus_2004_81_victims_trafficking_syntesis_en.pdf> accessed 16 December 2010.

³⁰⁷ T. Öhlinger and M. Potacs, *Gemeinschaftsrecht und staatliches Recht* (3rd edn, LexisNexis, 2006) p. 113.

³⁰⁸ SRA s. 69(a)(1)(2).

³⁰⁹ SRA s. 69(a)(1)(4)(a).

³¹⁰ Prerequisites which have to be normally fulfilled are for example that the foreigner is holder of a valid health insurance or has access to adequate housing. Cf. SRA s. 11(2).

³¹¹ SRA s. 69(a)(3).

is renewable.³¹² Consequently, Austria fulfils all requirements regarding a residence permit for the DIR 2004/81/EC and the Council of Europe Convention on Action against Trafficking in Human Beings. But, as shown above, Austria does not fulfil the requirements regarding the recovery and reflection period. Austria's regulation does not take into account granting a residence permit based on the personal situation of the trafficked person.³¹³ An issuance of the residence permit solely based on the personal situation would not be possible according to SRA s. 69a. Additionally, it is not clear whether the trafficked person has to cooperate with the authorities in order to receive the permit. The provision does not explicitly mention the necessity to cooperate with the authorities and at the same time does not explicitly exclude this necessity. According to the Ministry of Interior, this provision does not at all require the cooperation of the trafficked person. The decisive factor is whether the criminal investigation started in this case or not.³¹⁴

After the residence permit, next step would be the unlimited authorisation to settlement (*Niederlassungsbewilligung-unbeschränkt*).³¹⁵ In addition to the initial requirements of the permit for *special protection* (on-going criminal investigation and/or civil law claims), persons have to fulfil the integration agreement (*Integrationsvereinbarung*).³¹⁶

Trafficked persons from other EU Member States do not require the residence permit for *special protection*. EU citizens need a specific confirmation of registration (*Anmeldebescheinigung*) if they stay longer than 3 months in Austria. Prerequisites for this confirmation can create obstacles for victims of THB. It requires, for example, a passport or identification card as well as enough earnings or health insurance. Some of these requirements might be difficult to fulfil for trafficked persons. The relevant municipal department of the city of Vienna agreed to amend the requirements for victims of THB.³¹⁷

3.2.3 *Victims as witnesses in proceedings*

In recent years, the Code on Criminal Procedure has been amended several times. The improvement in the rights of victims was of central interest in these amendments and led to the introduction of a chapter on victims' rights in the code. In general, victims of crimes have rights with regard to participation in

³¹² SRA s. 69(a)(3).

³¹³ As the Council of Europe Convention on Action against THB suggests for example in Art. 14(1)(a).

³¹⁴ Cf. Explanatory Notes XXIV. GP regarding the amendments of the Law on Asylum 2005, the APA 2005 and the SRA (government bill 88, 14).

³¹⁵ Cf. SRA s. 43(3).

³¹⁶ Cf. SRA s. 14(5). The integration-agreement requires inter alia sufficient knowledge of German.

³¹⁷ Cf. LEFOE-IBF, 2009 *Annual Report* (Vienna 2010) p. 25.

criminal proceedings, and right to protection as well as compensation.³¹⁸ In order to ensure that victims can make use of their rights, the Code on Criminal Procedure states that police, public prosecution and the court are under an obligation to inform the victim.³¹⁹ Furthermore, the rights of victims encompass the right to have access to court files, the right to have interpretation free of charge as well as the right to receive psycho-social and legal assistance.³²⁰

Essential within these amendments is the implementation of the institution on psycho-social and legal assistance.³²¹ This assistance is provided to victims during criminal proceedings and is free of charge. Those who are entitled to this assistance are the victims of deliberate offences which exposed them to violence or serious threat and may have been harmful to their sexual integrity. Additionally, relatives of a victim who died because of a criminal offence as well as relatives who have been witnesses of the offence are entitled to this assistance.³²² The assistance consists of legal and psychosocial support. The legal support encompasses legal representation during the proceedings; the psychosocial support includes preparation for the proceedings and for example accompanying the victim to all questionings. LEFOE-IBF organises prior to the criminal proceedings a legal counselling meeting with the representing lawyer. In this meeting, the client gets information on the court system and the upcoming proceedings.³²³

The Ministry of Justice entrusts specific, qualified institutions or organisations with the assistance. The psycho-social and legal assistance is in general free of charge for the victim; the Ministry of Justice bears the costs. In general, the assistance is of high importance and is used often. In 2008, 2829 persons used this assistance and the Ministry of Justice had to budget almost € 4 million for it.³²⁴

In 2009, the right to psycho-social assistance was extended also to civil law proceedings.³²⁵ The psycho-social assistance is applicable when the civil proceedings are linked to the foregoing criminal proceedings.

Regarding testimony, specific groups of victims have certain special rights. Victims under the age of 14, as well as victims of offences which may have

³¹⁸ Marianne Hilf and Philipp Anzenberger , ‘Opferrechte: Die Stellung des Opfers im Strafverfahren’ (2008) ÖJZ 2008/94, p. 888.

³¹⁹ Cf. inter alia CCP s. 10(2).

³²⁰ Marianne Hilf and Philipp Anzenberger , ‘Opferrechte: Die Stellung des Opfers im Strafverfahren’ (2008) ÖJZ 2008/94, p. 889.

³²¹ Cf. CCP s. 66(2).

³²² Cf. CCP s. 66(2).

³²³ Cf. LEFOE-IBF, *2009 Annual Report* (Vienna 2010) p. 24.

³²⁴ Dina Nachbauer, ‘Die "persönliche Betroffenheit" von Opfern als Erfordernis des Rechtsanspruchs auf Prozessbegleitung’ (2010) JSt 2010, p. 49.

³²⁵ Cf. Second Act on Protection against Violence (*Gewaltschutzgesetz*), Federal Law Gazette No. I 40/2009.

violated their sexual integrity, can testify early during the investigating stage with participation of the parties (*kontradiktorische Vernehmung*). This form of testifying allows the victim to be questioned separate from the perpetrator. On the one hand, victims can testify during the trial proceedings and sit in a separated room equipped with video equipment. On the other hand, it is also possible that, based on early testifying during the investigation stage, additional questioning during the trial proceedings can be avoided.

In some cases the victims or the public prosecutors have to make a request in order to be able to testify early, while in other cases the courts are obliged to do it that way. In any case, victims of sexual offences under the age of 14 must be provided with the opportunity to testify early. Victims of offences who have been exposed to violence or serious threat can testify during the proceedings in a separate room in the absence of the perpetrator.³²⁶ Victims who might have been violated in their sexual sphere have in addition the right to be questioned by a same sex person. Additionally, those victims can refuse to answer questions which are too personal or which require detailed descriptions of the offence which are not bearable for the victim.³²⁷ The trial proceedings may be conducted without any public access. However, in this case the victim may be accompanied by confidants.³²⁸

3.2.4 Right to compensation

Victims of crime can join the criminal proceedings as a so-called ‘private party’ (*Privatbeteiligung*) in order to claim compensation.³²⁹ These victims get additional rights and have *inter alia* the right to require the acceptance of further evidence.³³⁰ Victims become a ‘private party’ by declaration and have to justify the claims that they lodge. In general, the judge can defer the decision in respect of damages to the civil court. In cases where the proceedings are closed or the alleged perpetrator is acquitted, the court has to refer the victim to the civil court. Consequently, the victim has to file the complaint at a civil court. The situation is different if the perpetrator is convicted. Generally, the criminal court has to decide upon the amount of compensation paid when the results of the proceedings are sufficient to assess the amount of damage. But if further information or investigation would be necessary for the assessment, the criminal court refers the victim to the civil court. In short, the benefit for a victim being a ‘private party’ is that the person

³²⁶ Cf. CCP s. 250(3).

³²⁷ Cf. CCP s. 158(1)(2).

³²⁸ Karin Bruckmüller and Dina Nachbaur, ‘Opferrechte im Strafverfahren’ (2009) JAP 2009/2010/10, p. 71.

³²⁹ Cf. CCP s. 65(2).

³³⁰ Cf. CCP s. 67(6)(1).

would have a better chance of receiving compensation without bearing any of the costs of the proceedings compared to proceedings before the civil court.³³¹

State funded compensation is offered by the Victims of Crime Act (*Verbrechensopfergesetz*).³³² In general, this act applies when a person has been injured or has suffered other damages to health caused by an offence. Persons who have been injured in Austria, but are not from Austria, have to fulfil further criteria. The deliberate offence causing the injuries must be punishable by at least six months of imprisonment.³³³ Consequently, the VCA also applies to trafficking in human beings. The VCA provides for different payments and includes *inter alia* the provision in cases of loss of income, costs of medical treatment or different forms of rehabilitation.³³⁴ In addition, a lump sum for moral damages can be paid. The lump sum is usually € 1000, but can be increased to € 5000 based on the severity of the injury.

Access to VCA payments is handled by the Federal Social Welfare Authority. Austrian citizens can request payment when the offence happened in Austria or abroad. EU citizens also qualify for the VCA when the offence took place in Austria. Third country nationals have limited access to VCA payments. The offence must have taken place in Austria, and the victim is only entitled to payments when she/he was legally residing in Austria at the time.

In order to implement DIR 2004/80/EC,³³⁵ the Social Welfare Authority acts as the assisting or deciding authority in cases of cross-border applications. The directive, for example, foresees that a person who was injured as a result of an offence in another EU Member State can apply not only in the country in which the offence took place, but also in the country of usual residence. Austria acts in cases of THB as the deciding authority because the persons have been injured in Austria. At the same time, it is possible that trafficked persons file the application for compensation in their home country and Austria must then decide on the application. Experience with regard to cross-border cases has remained rather limited. In 2006 and 2007, Austria adjudicated on a total of 3 cross-border cases.³³⁶

Additionally, according to AEL s. 29, migrants who are working, but do not fulfil the requirements of the AEL or SRA, are entitled to the same claims

³³¹ Maria Eder-Rieder, 'Die Stellung des Opfers im neuen Strafverfahren' (2008) JSt 2008, pp. 118-119.

³³² Federal Law Gazette No. 288/1972 as amended by Federal Law Gazette I No. 4/2010, in the following VCA.

³³³ Cf. VCA s. 1 (1)(1).

³³⁴ Cf. VCA s. 2.

³³⁵ Council Directive (EC) 2004/80 of 29 April 2004 relating to compensation to crime victims [2004] OJ L 261/15.

³³⁶ Cf. Matrix insight, 'The application of Directive 2004/80/EC relating to compensation to crime victims (2008) p. 30 <http://ec.europa.eu/civiljustice/news/docs/study_application_directive_compensation_final_report_en.pdf> accessed 17 December 2010.

as a person with a regular working contract. This would include the possibility of claiming unpaid wages. LEFOE-IBF supports trafficked women when they are claiming unpaid wages before the court in respect of social and labour law. LEFOE-IBF also cooperates with the Chamber of Labour which offers legal counselling.³³⁷

3.3 Application of the legal framework in practice

Identification

Usually, actors who are not involved in anti-trafficking work directly have a general awareness about the existence of cases of THB in Austria. But at the same time, as shown by interviews THB does not fall within the scope of responsibility for these actors.³³⁸ On the one hand, responsibilities are clearly defined by law and consequently limit the scope of activity. Usually these actors are fully occupied with these responsibilities. On the other hand, organs such as the Control Unit for Illegal Employment, which are sensitised, lack sufficient information on how to identify presumed victims of THB, and also lack understanding of the necessary follow-up steps.

Cases show that there are different understandings of THB among relevant actors and the judiciary, suggesting that further awareness raising measures are needed. With regard to the judiciary, the level of general awareness regarding THB seems to be rather low. Notions such as ‘working in a household is not proper work’, ‘persons lie in order to receive benefits’ or ‘the person would anyway receive more than in his or her home country’ or the general belittlement of the situation of exploited workers, for example, influence proceedings in THB cases.³³⁹ Different legal assessments of THB lead to peculiar situations in specific cases. In one case regarding exploitation of a woman in domestic work, the criminal investigation was stopped before an indictment was brought, but later on the woman successfully filed a complaint before the court for social and labour law matters and received considerable compensation.³⁴⁰

The identification of victims depends on a specific notion of ‘victims of THB’. It has been observed that ‘victims of THB’ have certain attributes within the judiciary – being self-confident does not fit into this picture. In one case, a young woman, acting very self-confidently and speaking German fluently could not be, according to the judge, a ‘victim of THB’. The alleged

³³⁷ Cf. LEFOE-IBF, *2009 Annual Report* (Vienna 2010) p. 33 and case study 1.

³³⁸ Interview with Labour Inspectorate (November 2010) and interview with District Health Insurance Fund Vienna (November 2010).

³³⁹ Cf. Interview with NGO (August 2010), interview with Ministry of Finance (August 2010) and interview with Control Unit for Illegal Employment (August 2010).

³⁴⁰ Cf. Interview with NGO (August 2010).

perpetrator was thus acquitted.³⁴¹ An obstacle may also be that people often do not consider themselves as victims. It is difficult to assess whether a case is THB if the person entered Austria voluntarily and knew what they were going to do in Austria.³⁴²

The lack of identification is also linked to a general uncertainty about which cases could be assessed as cases of THB for labour exploitation. Closely linked to the above mentioned notion of victims of THB is the issue regarding the circumstances under which the work is done. Persons come to Austria in order to earn money and therefore shoulder burdens, such as poor living conditions or dangerous working conditions. But uncertainty exists over where THB actually starts and ends.

Generally, indicators on identifying cases of THB for labour exploitation do not exist in Austria. In trainings for the Control Unit for Illegal Employment, the police usually refers to the general indicators developed by international organisations, but cannot refer to Austria-specific indicators. The development of indicators on THB for labour exploitation would facilitate work in this area.³⁴³ Identified key indicators would include whether the person is able to move freely, and any form of violence.³⁴⁴ However, especially with forms of THB for labour exploitation, it needs to be stressed that the definition of THB does not require violence. Other means can also be used.

Assistance

As indicated above, the situation regarding National Referral Mechanisms with a focus on children and male victims is unsatisfactory. Since there are no specified institutions or organisations which would take care of male victims of THB, police refer presumed trafficked men for housing to different charitable organisations, such as Caritas Austria.³⁴⁵

The residence permit has to be issued after a time period of six weeks according to the SRA. During the first months of implementation of this time limit, experiences have been very positive and the limit was almost never exceeded by the Ministry of Interior.³⁴⁶ Experience in 2010, however, shows that issuing this permit takes between five and eight months³⁴⁷, which may raise several issues. On the one hand, trafficked persons are not covered by health insurance until their residence permit is issued. Consequently, LEFOE-IBF has to rely on voluntary treatments offered free of charge by medical

³⁴¹ Cf. Interview with NGO (August 2010).

³⁴² Interview with a public prosecutor (November 2010).

³⁴³ Cf. Interview with Control Unit for Illegal Employment (August 2010).

³⁴⁴ Cf. Interview with Criminal Intelligence Service (September 2010), interview with Ministry of Finance (August 2010) and interview with Control Unit for Illegal Employment (August 2010).

³⁴⁵ Cf. Interview with regional Criminal Intelligence Service (November 2010).

³⁴⁶ Cf. LEFOE-IBF, *2009 Annual Report* (Vienna 2010) p. 32.

³⁴⁷ Statement by LEFOE-IBF (Personal email correspondence 16 December 2010).

doctors. On the other hand, trafficked persons find themselves in a kind of legal vacuum without any residence permit. Since Austria is not properly implementing a reflection period, there is also no protection against expulsion during this period.³⁴⁸

Victims as witnesses in proceedings

The existence of psycho-social and legal assistance in criminal proceedings has constituted an enormous improvement with regard to the enforcement of the rights of victims. With regard to THB-cases, LEFOE-IBF provides psycho-social assistance to victims and organises legal assistance, which is mainly undertaken by two experienced lawyers in Vienna.³⁴⁹

In practice, the cooperation of the victim with law enforcement agencies is still very important. Victims who act as witnesses in court proceedings are essential. Other types of evidence are very difficult to produce, at least without entailing very high costs.³⁵⁰ As described in case study 2, it is considered key that victims act as witnesses. With regard to child trafficking, it has been suggested that in practice, children are not acting as witnesses in proceedings.

Right to Compensation

The possibility to act as a so called ‘private party’ within the criminal proceedings supports victims in claiming damages. Judges are not obliged to decide upon these damages and can refer the victim to the civil court. In such cases, no legal assistance is offered for civil law claims and only psycho-social assistance is accessible. Comparing the situation of compensation paid in cases of THB for sexual exploitation and THB for labour exploitation, it can be seen that with regard to THB for labour exploitation more legal opportunities are provided in respect of access to compensation. Unpaid wages can be claimed by the trafficked person at the court on social and labour law. In proceedings regarding THB for sexual exploitation, compensation is rather limited to the possibilities within the criminal court proceedings. The sums of unpaid wages granted to trafficked persons are higher than the sums for moral damage assessed in criminal proceedings. The lowest sum that a trafficked woman supported by LEFOE-IBF received was € 2500 for unpaid wages. Claims of unpaid wages can even be successful after the criminal investigation regarding the same case has ended. A woman, exploited in domestic work and supported by LEFOE-IBF, received € 15.000 for unpaid wages before the

³⁴⁸ Cf. Academic Network for Legal Studies on immigration and Asylum in Europe, *Directive 2004/81 Victims of Trafficking Synthesis Report* (2010) p. 33 < http://ec.europa.eu/home-affairs/doc_centre/immigration/docs/studies/odysseus_2004_81_victims_trafficking_synthesis_en.pdf > accessed 16 December 2010.

³⁴⁹ Cf. LEFOE-IBF, *2009 Annual Report* (Vienna 2010) p. 24.

³⁵⁰ Cf. Interview with a public prosecutor (November 2010).

court on social and labour law. At the same time, State prosecutors decided not to bring an indictment and closed the investigation.³⁵¹

Regarding the Victims of Crime Act, victims of THB face a number of obstacles when attempting to access payments. The National Action Plan foresees, therefore, that the Task Force will assess the practical applicability of this act in cases of THB.³⁵² Third-country nationals have to have been legally residing in Austria at the time the crime took place. This prerequisite is rather difficult to achieve for victims of THB. Most victims are forced to stay in Austria and are not aware of their current residence status. Based on this regulation, most THB victims would be excluded. In particular, a section of the act, which excludes payments in cases where the person would have access to similar payments in their home country,³⁵³ means that the procedure can be lengthy with regard to victims of trafficking. The authority in Austria has to assess whether the victim of THB could receive payments in the home country.

3.4 Summary of findings

3.4.1 Identified obstacles

Generally, it can be observed that the identification of victims of THB for labour exploitation, and following a referral system and assistance for victims of THB for labour exploitation, is rather difficult. The existing National Referral Mechanism in Austria covers cases of THB for sexual exploitation, women exploited in domestic work, exploitation through begging and, to a certain extent, trafficking in children. Identifying presumed victims of THB for labour exploitation requires the inclusion of further actors and sometimes different ways of cooperation. As indicated above, apart from the well-functioning and practiced ways of identification and cooperation, identification faces several obstacles.

As elaborated in Section 1, regarding THB for labour exploitation, no formalised system on identification and cooperation exists. The core functions of a National Referral Mechanism are the identification of presumed trafficked persons and the regulation of cooperation between different actors in order to ensure assistance to the presumed trafficked persons.³⁵⁴ Gaps in a formalised system with regard to THB for labour exploitation can be observed.

³⁵¹ Cf. Interview with NGO (August 2010).

³⁵² Cf. Austrian Task Force on Combating Human Trafficking, *First Austrian Report on Combating Human Trafficking* (2008) p. 17.

³⁵³ Cf. VCA s. 8(3).

³⁵⁴ T. Kröger, J. Malkoc, BH Uhl, *National Referral Mechanisms – A Practical Handbook* (OSZE/ODIHR 2004) p. 16.

As indicated above, with regard to the identification of cases, indicators on THB for labour exploitation in Austria are missing, and some authorities have clear responsibilities during an inspection, excluding THB for labour exploitation. It can therefore be assumed that not all presumed trafficked persons can be identified. At the same time, means of further cooperation between various actors after identifying indicators are vague. As described, third country nationals who are illegally in the country, as so identified during an inspection, are usually referred to the police and deported.

Assuming that there are also male victims of THB, and more specifically of THB for labour exploitation, assistance for these victims has to be provided. Specialised services for men, offering housing for example, do not exist so far in Austria.

Migrant workers, who do not fulfil all the requirements of the AEL or SRA, are entitled to claim wages in the same way as persons holding regular working contracts. Although it is legally possible to claim unpaid wages, for example, the implementation in practice is rather difficult since there is no formal support for access to this right in Austria.³⁵⁵ Austria's situation regarding undocumented migrant workers in general is focused on sanctioning the employer, with little access to protection and rights for the workers.³⁵⁶ In Austria, some initiatives exist which seek to improve the situation of documented and undocumented migrant workers, such as the project 'work@migration' of the Union of Salaried Private Sector Employees or the initiative called 'PrekaerCafé'.³⁵⁷ Services for undocumented migrant workers such as the German model, organised by the trade union ver.di,³⁵⁸ do not exist in Austria. In addition to a system of national referral with regard to THB for labour exploitation, which would need further development in Austria, there is also the need for systemised awareness raising and nation-wide assistance with regard to trafficked children. Gaps in awareness within the youth welfare authorities in all provinces of Austria, and insufficient specialized institutions in all provinces for trafficked children, are reported.

An obstacle to the identification of victims is also the lack of a clearly defined notion of victims. In case study 1, the interview partner stated that awareness raising among public prosecutors and judges needs to be further supported. The acquittal in the case illustrates existing attitudes. Domestic work was not considered 'work'. It was considered that the person made false allegations in order to receive a residence permit. And – as stated in the

³⁵⁵ Cf. Interview with Chamber of Labour (August 2010).

³⁵⁶ PrekärCafé, 'Mehr als ein Stück Papier' (2010) <<http://www.migrazine.at/artikel/mehr-als-ein-st-ck-papier>> accessed 22 December 2010.

³⁵⁷ Cf. <<http://www.myspace.com/prekaer>> and <http://www.gpa-djp.at/servlet/ContentServer?pagename=GPA/Page/Index&n=GPA_4.7.1> accessed 22 December 2010.

³⁵⁸ Cf. <http://besondere-dienste.hamburg.verdi.de/themen/migrat/themen/anlauf_stelle1> accessed 22 December 2010.

acquittal – a very self-confident and fluently German speaking woman did not fit into the accepted ‘victim’ identity.³⁵⁹

The current regulation regarding the residence for trafficked persons who are third-country nationals is considered unsatisfactory. The obligation to implement a recovery and reflection period is not sufficiently implemented in Austria, and the protection against expulsion is consequently also not implemented properly. Trafficked persons fall within a legal vacuum until the residence permit is issued, which can take more than half a year. Additionally, the current situation of residence does not offer enough protection and security of residence in order to persuade the trafficked person to cooperate with law enforcement and testify. Improving the regulation of residence as well as measures of victim protection would support the cooperation between the trafficked person and law enforcement.³⁶⁰

With regard to compensation, experience shows that more and more decisions on compensation are taken within criminal proceedings. However, sums of granted compensation are rather low.³⁶¹ Although the victim has psycho-social and legal support throughout the criminal proceedings, legal assistance is not offered when the judge refers the case to the civil court with regard to claims of moral damage.

The VCA provides the opportunity to receive payments, but victims of crimes have to reside legally in Austria. This regulation excludes from the outset many victims of THB from all possible payments under the VCA. Payments are not made when the person has similar claims in their home country. Lengthy and bureaucratic proceedings in order to prove that the home country does not offer similar possibilities are seen as problematic with regard to victims of THB.

3.4.2 Good practices

The implementation of psycho-social and legal assistance for specific groups of victims of crimes offers great support to victims of THB. This assistance, offered free of charge, is seen as essential in order to have access to all rights during the proceedings. The victim can be prepared before the proceedings and a lawyer ensures that the victim can use all the rights granted. According to the experience of LEFOE-IBF, the implementation of psycho-social and legal assistance works very well in practice.³⁶² Additionally, the right to follow the criminal proceedings as a ‘private party’ supports the right to have access to compensation.

³⁵⁹ Cf. Interview with NGO (August 2010).

³⁶⁰ Cf. Interview with regional Criminal Intelligence Service (November 2010).

³⁶¹ Cf. LEFOE-IBF, *2009 Annual Report* (Vienna 2010) p. 24.

³⁶² Cf. Interview with NGO (August 2010).

The FMEIA introduces several measures in order to raise awareness regarding THB for labour exploitation in diplomatic households. In a circular letter the FMEIA has informed all embassies and international organisations based in Vienna about the Austrian Law on Domestic Workers, especially on minimum wages and working hours. Domestic workers must get their legitimisation card on their own at the FMEIA, which allows staff to talk to the worker in privacy.³⁶³

³⁶³ I Brickner, 'Hilfe für ausländische 'Haussklavinnen'' (Help for foreign 'houseslaves') *Der Standard* (Vienna 2 December 2009).

Part IV

Case studies

Case 1

This exploitative situation took place between March 2002 and July 2006. The information about this case was received within an expert interview.³⁶⁴

The person concerned (Z) was referred to the NGO LEFOE-IBF by another women's shelter (usually dealing with women who face violence). The case concerns domestic work. The legal assessment of this case is threefold. Criminal proceedings took place based on complaints including 'exploitation of a foreign person' (APA s. 116)' as well as 'misuse of authority' (CC s. 212) and 'sexual coercion' (CC s. 202). In addition, the Chamber of Labour Vienna initiated requests in order to obtain unpaid wages. The third proceeding concerns the social insurance law and whether the work done by Z can be seen as an employment relation, which would entail an entitlement to social insurance.

15-year old Z from Latin America came to Austria in order to take care of the child of the family of X and Y and to do the housework. X's father talked to the parents of Z telling them that Z should live in Austria with X and Y and support them with child care in exchange. Additionally, Z expected to be able to pursue vocational training.³⁶⁵ Z had for the first six months a legal residence status. An application to prolong the residence permit was unsuccessful. Consequently, Z had as of mid 2002 no regular residence status.³⁶⁶ According to Z, she worked until 2004 seven days a week from 7 am till 7 pm. Afterwards she worked less, but still five days a week for around nine hours, and on the weekends 12 hours. Additionally, according to Z, she was raped by Y several times.³⁶⁷ For the first period, Z received 220 \$ a month, with 100 \$ of that sum being paid directly to the parents of Z. From 2006 onwards, Z received around 100 \$.³⁶⁸ In November 2006, Z moved out of the common apartment and found another place to live.³⁶⁹ X found out about her husband's intercourse and immediately arranged a return ticket for Z. Z was supposed to show up at their place in order to discuss the return ticket. Z asked friends to call the police if she were not back within an hour. Finally, the friends called the police.

³⁶⁴ Cf. Interview with NGO (August 2010).

³⁶⁵ Appeal against decision of municipal department 40 of Vienna, p. 4.

³⁶⁶ Decision of Regional Criminal Court Vienna, 2 October 2007, p. 7.

³⁶⁷ Decision of Regional Criminal Court Vienna, 2 October 2007, p. 13.

³⁶⁸ Decision of Regional Criminal Court Vienna, 2 October 2007 and record of the Social Insurance Vienna, 22 January 2008.

³⁶⁹ Decision of Regional Criminal Court Vienna, 2 October 2007, p. 9.

Cooperation

The police referred Z first to a women's shelter. From there she was referred to LEFOE-IBF, with the support of the police. LEFOE-IBF initiated the usual steps for supporting women.³⁷⁰ The cooperation between the NGO and the police worked as usual. The police investigated the case and legal proceedings were initiated. The NGO did not monitor any difference in the cooperation with the police because this case included exploitation in domestic work and not, as in the majority of cases, sexual exploitation in prostitution.³⁷¹

Victim Protection

When Z moved to Austria, she was 15 years old. She, as well as the family of X and Y, have a Latin American background and come from the same country. The families of X and Z know each other. It seems that Z and X have the same father - a fact which did not initially come to light and was not clarified.³⁷²

After talking to the police in 2006, Z was referred first to a women's shelter, then to LEFOE-IBF. Consequently LEFOE-IBF initiated the process for obtaining a residence permit *for special protection* for Z, which was granted.³⁷³ Up until the start of the trial, Z was supported by LEFOE-IBF for six months. Z cooperated with the law enforcement agencies. Z was able to get psychosocial and legal assistance throughout the criminal procedure.

Period after proceedings

X and Y were acquitted regarding 'exploitation of a foreign person' (APA s. 116) and 'misuse of authority' (CC s. 212) as well as 'sexual coercion' (CC s. 202).

The court described the contact between Y and Z as an 'exchange of affectionateness', initiated by Z. Y would not have made use of his authoritative position as host, and the extramarital relationship was based on mutual agreement.³⁷⁴ Regarding the exploitation in the household, it was argued that the witness Z indicated exploitation. But later on she said - in conformity with X - that she was able to decide about her spare time and work in other households.³⁷⁵ Furthermore, the court then elaborated the main motive for Z staying in Austria and the possibility that she made false allegations in order to receive a residence permit *for special protection*. The return ticket was booked one day after Z initiated the complaint. The court concluded that she wanted to avoid her return. The court could not preclude

³⁷⁰ Cf. Interview with NGO (August 2010).

³⁷¹ Cf. Interview with NGO (August 2010).

³⁷² Decision of Regional Criminal Court Vienna, 2 October 2007, p. 6 and appeal against decision of municipal department 40 of Vienna, p. 3.

³⁷³ Based on SRA s. 69 a(1).

³⁷⁴ Decision of Regional Criminal Court Vienna, 2 October 2007, pp. 8-9.

³⁷⁵ Decision of Regional Criminal Court Vienna, 2 October 2007, p. 10.

the possibility that Z pretended to be sexually exploited in order to receive the residence permit.³⁷⁶ Additionally, the court held that Z was a very self-confident and a fluently German speaking young lady, whereas Y does not speak German very well and therefore did not understand the questions properly during his first questioning by the police, in which he stated that sexual acts happened against Z's will.³⁷⁷ The court finally concluded that there was no situation of exploitation. The court referred to the condition of *ruthless exploitation of vital interests of the victim* in order to establish exploitation. Z would have lived like a family member with X and Y and would have taken care of the children and the household. For this work she received pocket money and she was able to decide about her spare time freely. Additionally, she was able to work for others and could save this earned money. Consequently, no situation of exploitation was held to have occurred.³⁷⁸

The Chamber of Labour Vienna lodged a request for the receipt of unpaid wages. For this employment, the minimum wages for domestic workers were applicable.³⁷⁹ Claims are expired after three years³⁸⁰; therefore no further steps were possible.³⁸¹

In addition, the District Health Insurance Fund came to the conclusion that Z's work entitled her to be fully protected by the social security system (including insurance of sickness, work-related accidents and pensions). However, the higher instance decided differently. Z's work was seen as support and as a share of the household work, including caring for children, within shared accommodation. She worked in exchange for boarding. Household work did not occupy Z entirely, and did not exclude Z's full self-determination.³⁸² LEFOE-IBF appealed against this decision.³⁸³

³⁷⁶ Decision of Regional Criminal Court Vienna, 2 October 2007, pp. 11–13.

³⁷⁷ Decision of Regional Criminal Court Vienna, 2 October 2007, pp. 13–14.

³⁷⁸ Decision of Regional Criminal Court Vienna, 2 October 2007, pp. 15–16.

³⁷⁹ Based on the Law on Domestic Workers (Federal Law Gazette No. 235/1962 as amended by Federal Law Gazette I No. 100/2002) a minimum wage applies. For Vienna this minimum wage for an unskilled worker in the first year (without preparing meals) would be € 1,000 (pre-tax). Cf. <http://www.bmask.gv.at/cms/site/attachments/1/7/8/CH0787/CMS1244015004738/hausgehilfenwien_mlt.pdf> accessed 29 November 2010.

³⁸⁰ Claims regarding wages prescribe after three years (Civil Code s 1502), cf. W. Brodil, M. Risak and C. Wolf, *Arbeitsrecht in Grundzügen* (6th edn LexisNexis, Vienna 2010)(512).

³⁸¹ Interview with NGO (August 2010).

³⁸² Decision of municipal department 40 of Vienna, p. 11.

³⁸³ Interview with NGO (August 2010).

Case 2

This case describes an exploitative situation in the agricultural sector in Austria.

Two asparagus-producers had been charged with exploiting 84 Slovakian harvest workers in 2006. According to the indictment, the harvest helpers had to work up to 77 hours per week and received only € 3,60 per hour instead of the minimum wage of € 5,27.³⁸⁴ Since the workers officially worked for 20 hours only, the case was preliminarily dealt with as case of fraudulent withholding of social security duties.³⁸⁵ It is reported that social security were owed about € 46.000.³⁸⁶ Representatives of the Control Unit for Illegal Employment conducted an inspection of an agricultural business and found out about the working conditions when talking to the workers. First, the workers said they worked from 8 am till midday, but after further questioning they admitted that they worked from 7 am to 7 pm. A 30-minutes lunch break as well as housing costs had been deducted from the wages. The harvest helpers complained about the working conditions.³⁸⁷ In the trial, the asparagus-producers were acquitted.

Cooperation

During the control, the Control Unit for Illegal Employment received information regarding working hours. After the inspection, they requested permission to enter the premises for further authorities, including police. Special organs of the customs department and the tax authority also took part and seized several objects. Afterwards, they filed a complaint regarding fraudulent withholding of social security duties.³⁸⁸ It was stated that experience with cases, including consideration of possible indicators of exploitation, was rather small. The cooperation between the public prosecution and Control Unit for Illegal Employment could be improved.³⁸⁹ The public prosecutor investigated further and the case led to a trial.

Victim Protection

Information about the situation of the harvest helpers is rather lacking. The 84 female and male harvest helpers came from Slovakia. Most of them had valid working permits. The Control Unit for Illegal Employment got in touch with the harvest helpers during an inspection of the premises. There is no information on any special measure for the persons involved. During the

³⁸⁴ R. Eiben, 'Kein Lohn für Gastarbeiter während der Spargel wächst' (No wages for migrant workers during the asparagus grows) *Kurier* (13 July 2007).

³⁸⁵ Based on CC s. 153(d) *Betrügerisches Vorenthalten von Sozialversicherungsbeiträgen und Zuschlägen nach dem Bauarbeiter-Urlaubs- und Abfertigungsgesetz*.

³⁸⁶ R. Eiben, 'Kein Lohn für Gastarbeiter während der Spargel wächst' (No wages for migrant workers during the asparagus grows) *Kurier* (13 July 2007).

³⁸⁷ Cf. Interview with Control Unit for Illegal Employment (August 2010).

³⁸⁸ Cf. Interview with Control Unit for Illegal Employment (August 2010).

³⁸⁹ Cf. Interview with Control Unit for Illegal Employment (August 2010).

inspection, the harvest workers cooperated with the organs. Since it was not clear at the beginning that exploitation could be occurring, the harvest workers did not receive any specific information or specific protection.

Period after proceedings

In the trial, the producers were both acquitted. The final indictment did not only mention the charge of ‘fraudulent withholding of social security duties’, but also ‘trafficking in human beings’ and ‘exploitation of a foreigner’. The defendants were acquitted in respect of all three charges. It is reported that the producers denied the accusations. The explanation for the registration of only 20 working hours per week instead of – as stated by the harvest helpers – up 70 hours per week is that asparagus could only be harvested in the early morning and in the afternoon. The waiting times in between were not reported to the AES. These hours of waiting would not be considered for payroll accounting.³⁹⁰ This claim is highly doubted by the control organs. The harvest helpers did not show up at the trial and sent a letter instead saying that they did not want to testify for or against the producers. However, the testimonials of the harvest helpers would have been essential.³⁹¹ Missing evidence of guilt led to the acquittal.

³⁹⁰ R. Eiben, ‘Kein Lohn für Gastarbeiter während der Spargel wächst’ (No wages for migrant workers during the asparagus grows) *Kurier* (13 July 2007).

³⁹¹ Cf. Interview with Control Unit for Illegal Employment (August 2010).

Part V

Recommendations

General recommendations

- 1) In Austria, a stakeholder meeting should be organised with representatives of all relevant authorities, institutions and NGOs, which would help to improve cooperation in THB for labour exploitation. Combating THB for labour exploitation requires the involvement of different stakeholders from those relevant with regard to THB for sexual exploitation or child trafficking. Other relevant authorities, discussed in this report, are the Control Unit for Illegal Employment, the Labour Inspectorate, the District Health Insurance Fund Stakeholders and the Construction Workers' Annual Leave and Severance Pay Fund. A stakeholder meeting discussing THB for labour exploitation requires the attendance of stakeholders representing employee's interests and migrant worker's interests, such as trade unions, labour organisations and NGOs dealing with undocumented migrant workers in Austria.
- 2) Generally, awareness raising measures such as trainings focusing on THB for labour exploitation are needed. These measures should follow a strategic plan and cover all relevant stakeholders. Multi-stakeholder trainings could create the basis for sustainable cooperation across the authorities or organisations.
- 3) It is recommended that the existing efforts for a comprehensive National Referral Mechanism in Austria be further developed. It should also focus on THB for labour exploitation. Therefore, the involvement of more stakeholders nationwide is necessary.
- 4) The development of a list of indicators on THB for labour exploitation specifically for the Austrian situation would support the identification of presumed trafficked persons and is therefore recommended. Bearing in mind that a list of indicators is not the only tool of identification, further accompanying measures which support identification have to be taken into account.
- 5) The Austrian National Action Plan against Human Trafficking includes measures, which are seen as essential for combating THB for labour exploitation. Examples include the measures regarding potential contact centres for presumed male victims of THB, further discussions on a broadened NRM which focuses also on trafficked children, a review of the criminal law regarding THB, and the improvement of statistical data regarding THB. In order to ensure the implementation of these actions, adequate resources have to be allocated.
- 6) Inspired by the Council of Europe Convention on Action against Trafficking in Human Beings, it is recommended that all measures

follow a gender-mainstreaming and child-rights approach in their development, conception and implementation. Trafficked children are also exploited for the purpose of labour exploitation and the role of women in THB for labour exploitation needs to be taken into consideration to the same extent as the role of trafficked men.

5.1 Recommendations regarding the definition of Trafficking in Human Beings for labour exploitation

- 1) In order to be able to better assess the situation on THB for labour exploitation in Austria, more specified statistical data as well as further research are needed. The data and information currently available do not allow for a full understanding of the dimensions of THB for labour exploitation in Austria.
- 2) The National Action Plan foresees a review of all applicable legal regulations regarding THB for labour exploitation. The category of 'exploitation of a foreign person' (APA s. 116) should in particular be evaluated.
- 3) It should be ensured that all victims of THB, irrespective of which legal regulation on THB is applied, have equal access to support and assistance. All victims of THB should have access to psycho-social and legal assistance, provided that the requirements are satisfied.
- 4) Since the criminal liability of legal persons may play a vital role in combating THB for labour exploitation, it is recommended that the application of the rather new CCLA is evaluated. Measures supporting the enhanced implementation of the CCLA should follow.

5.2 Recommendations regarding investigation and prosecution

- 1) As a sustainable follow-up to the suggested stakeholder meeting, it is recommended that a working group dedicated to THB for labour exploitation is established within the Austrian Task Force on Combating Human Trafficking. Working groups on specific topics, such as child trafficking, have proved to be valuable instruments.
- 2) Authorities, *inter alia* the Control Unit for Illegal Employment as well as Labour Inspectorates, possess the right to enter premises. The legal competence to conduct inspections and controls are extensive, but necessary at the same time, in order to ensure effective protection of employees, for example. All authorities in addition to the police may be permitted to enter specific business premises and under certain circumstances also private homes, but only for specific purposes. Such permissions should also be made available for combating THB.

- 3) Since the exchange of relevant information between these authorities³⁹² is legally regulated in various acts, such as the AEL, it is recommended that awareness on THB for labour exploitation is raised within these authorities. Although THB is not specifically part of the scope of responsibility for these authorities, it is recommended that these authorities be able to identify, at least, indicators of THB, and so can inform the relevant authorities. In respect of information sharing and forwarding, as well as access to databases, the rights of the data subject with regard to personal data must be safeguarded.
- 4) Awareness raising measures, such as information round tables or trainings, need to be conducted. Trainings should be available to all relevant actors including the Control Unit for Illegal Employment, Labour Inspectorate, District Health Insurance Fund Stakeholders and the Construction Workers' Annual Leave and Severance Pay Fund. At the same time, on-going trainings are recommended for all police units that may have contact with presumed trafficked persons, including the aliens' police unit, youth welfare authorities, State prosecution and judges. Trainings should explicitly focus on THB for labour exploitation and integrate a human rights based approach against THB. This would include *inter alia* the protection of victim's rights and interests, ensuring access to compensation for victims and access to justice for trafficked children.
- 5) The existing efforts for a comprehensive NRM needs to be further developed in order to tackle the needs of combating THB for labour exploitation. It should therefore define the cooperation between relevant stakeholders. The parameters of information sharing and access to assistance have to be outlined, and cooperation between various authorities and organisations on an operational level must also be determined. Examples include contacting the relevant unit of the police or ensuring residence of the presumed victim and the referral to an adequate institution.
- 6) Enhanced cooperation between relevant authorities and exchange of information between e.g. police, Labour Inspectorate and Control Unit for Illegal Employment may have a positive impact on gathering more evidence on THB for labour exploitation in specific cases. The gathering of more evidence would minimise the dependency on testimonials of victims.

³⁹² See for detailed information M. Heemskerk and C. Rijken, 'Combating Trafficking in Human Beings for Labour Exploitation in The Netherlands', Chapter 2, para 2.1 in this book.

- 7) The usage of JITs should be further actively promoted. Further awareness raising within public prosecutors on THB in general, and the advantages of JITs in transnational cases of THB, may facilitate access to creating JITs.
- 8) The translation of documents or requests plays an important role within various frameworks, such as transborder investigations or the directive on compensation of victims of crime. Translations may lead to delays. Therefore, it is recommended that adequate resources for translation costs be allocated.
- 9) Further efforts are needed on the part of the international community and EU Member States to set up single points of contacts within States to deal with the prosecution of THB. These specified units need to have adequate competences.

5.3 Recommendations regarding victim protection

- 1) The current regulations regarding residence of trafficked persons need improvement. The residence of victims of THB cannot be fully secure since there is no comprehensive protection from expulsion. It has to be ensured that presumed victims of THB, including victims of THB for labour exploitation, do not face deportation. Additionally, access to justice has to be guaranteed for all victims of THB, including trafficked children.
- 2) Austria needs counselling facilities for documented and undocumented migrant workers, especially legal counselling. In order to ensure access to rights, such as the right under AEL s. 29, specified services are needed.
- 3) The existing efforts for a comprehensive NRM needs to focus more specifically on trafficked children. Enhanced awareness and cooperation of the relevant actors should be the focus. Additionally, support for children in specialised institutions has to be ensured. The NRM should also take into account access to residence and education, and access to justice for trafficked children, including compensation, in Austria.
- 4) Access to compensation within criminal proceedings for trafficked persons should be further evaluated and improved.
- 5) It is recommended that access to payments resulting from the VCA for trafficked persons be improved. Barriers for trafficked persons, such as the prerequisite of having a legal residence status in Austria at the time of the offence, should be removed.